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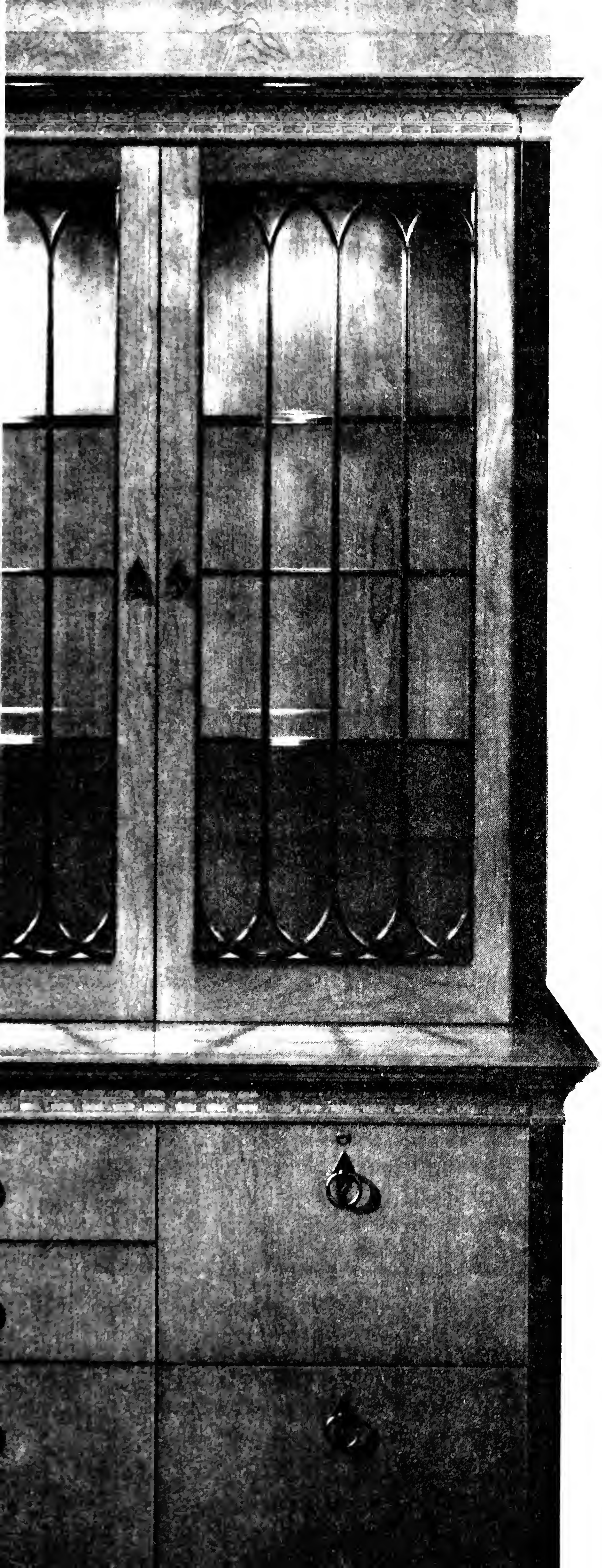
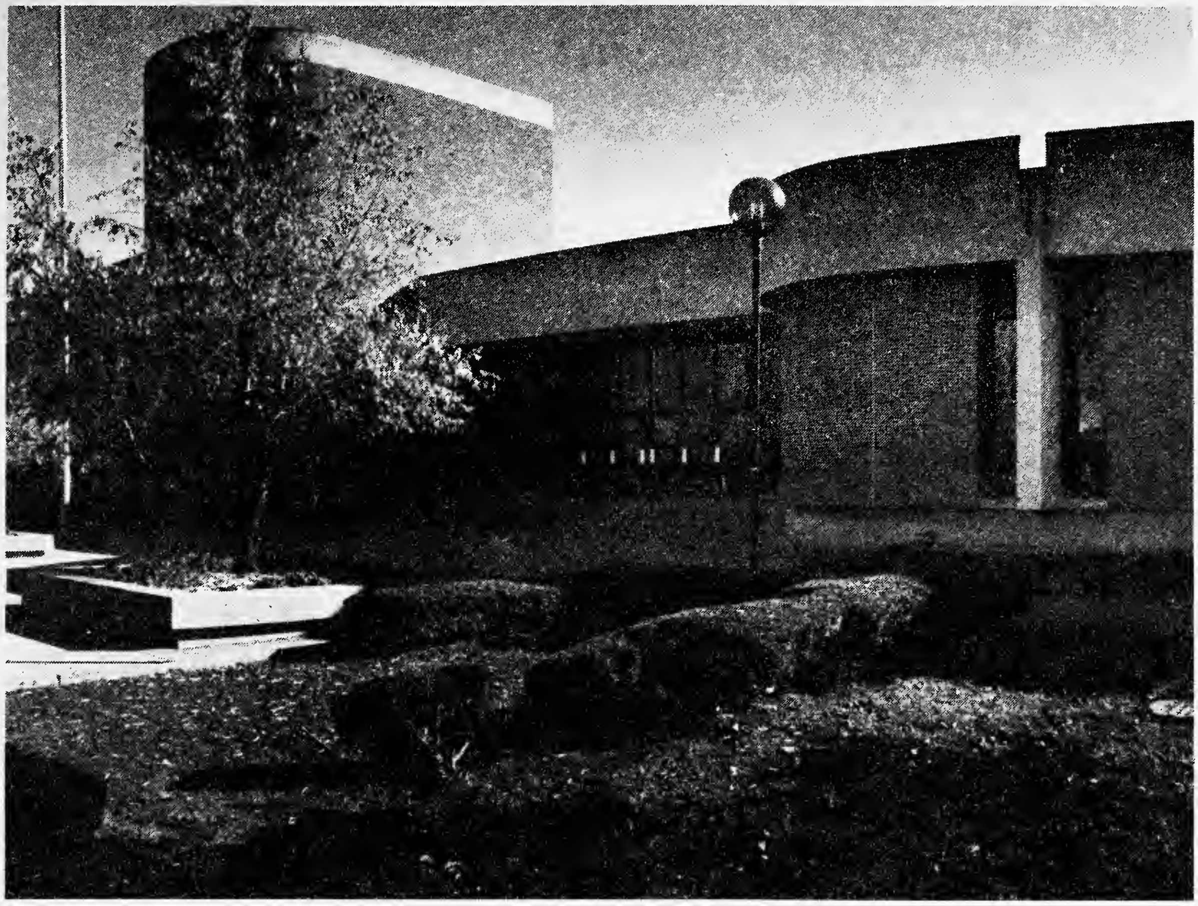
CENTENNIAL YEAR
1894/1895—1994/1995

ARTICLES

NOTES





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ARTICLES

Why Courts Should Refuse to Enforce Pre-Petition Agreements That Waive Bankruptcy's Automatic Stay Provision

William Bassin*

Introduction

For centuries parties have been free to enter into contracts and to have courts enforce them without passing judgment on their substance.[1] One noted commentator has stated that "[t]he principle of freedom of contract rests on the premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements."[2] Nevertheless, in certain instances, public policy concerns outweigh an individual's right to freely contract with another party.[3] As a result, state and federal legislatures have passed statutes prohibiting individuals from forming contracts that are contrary to the welfare of society.[4] If a statute prohibiting various activities does not explicitly ban the formation of contracts with respect to those activities, "[j]udges must determine whether unenforceability [of such contracts] should be added to those sanctions provided by the legislature."[5] The judge's determination should be based upon a careful balancing of factors. Specifically, a court should enforce a contract unless the potential benefit in deterring the misconduct prohibited by statute outweighs the factors favoring enforceability.[6]

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I would like to thank Professor Harriet King for her helpful comments on this article.

1. E. Allen Farnsworth, Contracts § 5.1, at 345 (2d ed. 1990).
2. *Id.*
3. *Id.* at 348. Farnsworth notes that "[a] court may be moved by two considerations in refusing to enforce an agreement on grounds of public policy. First, it may see refusal as an appropriate sanction to discourage undesirable conduct, either by the parties or by others. Second, it may regard enforcement of the promise as an inappropriate use of the judicial process to uphold an unsavory agreement." *Id.* at 346.
4. *Id.* § 5.5, at 370 ("Although many important public policies were first recognized by judges, the declaration of public policy has become increasingly the province of legislators."). For example, certain statutes explicitly outlaw the formation of contracts where forming an agreement is an essential part of the conduct the legislature seeks to eliminate. Notable examples are usury statues, gambling statutes, and statutes that prohibit the formation of contracts on Sunday. *Id.* at 371 nn.7 & 8.
5. *Id.* at 371.
6. *Id.* § 5.1, at 348.

In enacting the Bankruptcy Code, Congress explicitly outlined mandatory rules that enhance important public policies. These policies include granting the debtor a "fresh start" following bankruptcy[7] and also facilitating equitable treatment of all creditors during the bankruptcy process.[8] Additionally, section 362 of the Bankruptcy Code, better known as the automatic stay , is an invaluable tool for protecting both the debtor and the debtor's creditors during a bankruptcy proceeding.[9] The stay prohibits any creditor from commencing or continuing any judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the debtor filed a bankruptcy petition.[10] Because of the stay's importance, Congress has specifically declared the stay mandatory in all bankruptcy proceedings with only limited exceptions.[11]

To permit parties to independently contract out of the automatic stay's protections would contradict the public policies that underlie Congress's enactment of that provision. This article examines Congress's underlying policy goals in enacting the automatic stay and concludes that under *no* circumstances should parties be entitled to cast aside the automatic stay simply by contracting out of that provision prior to a debtor's filing for bankruptcy. Enforcing pre-petition waivers of the automatic stay might initiate a slide down a slippery slope in which courts enforce pre-petition waivers of other Code provisions, such as the Bankruptcy Code's "fresh start" provisions.[12] The Bankruptcy Code would then become an "optional" device for reorganization, and all semblance of an orderly reorganization and liquidation procedure that the Code seeks to achieve would be lost in favor of unpredictable outcomes at the hands of a few independent parties.[13]

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7. The "fresh start" has been one of the primary goals of both the Bankruptcy Act and the Bankruptcy Code, and embodies the notion that a debtor, by filing for bankruptcy, should be relieved of all prior debts following the termination of the bankruptcy proceeding. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). The Supreme Court in *Local Loan Co. v. Hunt* emphasized that a complete discharge of prior debts following bankruptcy gives the debtor "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Id.* The Bankruptcy Code's "fresh start" policy was incorporated into section 524 of the Bankruptcy Code, which provides for a broad discharge of the debtor's debts following bankruptcy. *See* 11 U.S.C. § 524 (1988).

8. H.R. REP. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6296-97.

9. H.R. REP. NO. 595. The legislative history states that "[t]he automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors." *Id.*

10. 11 U.S.C. § 362(a)(1) (1988). The stay also provides other important relief for the debtor. Specifically, the automatic stay prohibits: (1) enforcement of a judgment obtained before the filing of the petition against a debtor; (2) any act to obtain possession of or exercise control over the debtor's property; (3) any act to create, perfect, or enforce any lien against property of the debtor's estate; (4) any act to collect, assess, or recover a claim against the debtor that arose prior to the bankruptcy case; and (5) the setoff of any debt owing to the debtor that arose before the bankruptcy case. *Id.* § (a)(2)-(8).

11. *See infra* notes 17-22 and accompanying text.

12. *See supra* note 7.

13. *See* Federal Nat'l. Bank v. Koppel, 148 N.E. 379, 380 (Mass. 1925). When discussing pre-petition waivers of bankruptcy provisions, the court stated "[i]t would be vain to enact a bankruptcy law with all its elaborate machinery for settlement of the estates of bankrupt debtors, which could so easily be rendered of no effect." *Id.*

Part I of this Article discusses the scope and operation of section 362 of the Bankruptcy Code—the automatic stay. Part II surveys several bankruptcy court decisions in which the court essentially enforced a pre-petition waiver of the automatic stay. Part III outlines the various reasons why pre-petition waivers of the stay should not be enforced by bankruptcy courts. Part IV addresses and strikes down the notion that enforcing pre-petition waivers of the automatic stay will promote beneficial independent workouts and restructurings and suggests that, in certain situations, dismissal of the entire bankruptcy case is a proper alternative to enforcing pre-petition waivers of the stay.

I. The Scope and Operation of Bankruptcy Code Section 362—The Automatic Stay

The automatic stay in bankruptcy, as established by 11 U.S.C. § 362, is one of the fundamental debtor protections provided by the bankruptcy laws.[14] The stay prohibits any creditor from commencing or continuing any judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the debtor filed a petition for bankruptcy.[15] Although the stay prohibits creditor actions against the debtor, the stay does not curtail debtor actions that would increase the assets available in the debtor's estate.[16] The stay is "automatic" because it is triggered upon a debtor's filing of a bankruptcy petition regardless of whether a debtor's creditors are aware that the debtor has filed such a petition.[17] Once the stay is triggered, it "continues until the bankruptcy case is closed, dismissed, or discharge is granted or denied, or until the bankruptcy court grants some relief from the stay."[18]

Section 362(b) provides certain exceptions that allow a creditor to take action against the debtor in spite of the automatic stay.[19] These exceptions permit the commencement or continuation of a criminal action against the debtor, collection of alimony, and the commencement or continuation of certain governmental police or regulatory actions against the debtor.[20] Yet, because the scope of the automatic stay is extremely broad,[21] the exceptions are to be narrowly construed.[22]

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14. H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6296-97.

15. 11 U.S.C. § 362(a)(1) (1988). The stay also contains other prohibitions. *See supra* note 10.

16. Association of St. Croix Condo. Owners v. St. Croix Hotel, 682 F.2d 446, 448 (3d Cir. 1982).

17. Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1204 (3d Cir. 1991). *See also* NLT Computer Services v. Capital Computer Systems, 755 F.2d 1253, 1258 (6th Cir. 1985).

18. Pope v. Manville Forest Products Corp., 778 F.2d 238, 239 (5th Cir. 1985) (citing 11 U.S.C. § 362(a), (c)(2), (d), (e), (f) (1988)).

19. 11 U.S.C. § 362(b) (1988).

20. 11 U.S.C. §362(b)(1)-(5) (1988).

21. H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6296-97; *Maritime,* 959 F.2d at 1203; Stringer v. Huet (*In re* Stringer), 847 F.2d 549, 552 (9th Cir. 1988); 2 Collier On Bankruptcy ¶ 362.04, at 362-34 (15th ed. 1993) ("The stay of section 362 is extremely broad in scope and, aside from the limited exceptions of subsection (b), should apply to almost any type of formal or informal action against the debtor or the property of the estate.") (footnotes omitted).

22. *In re* Stringer, 847 F.2d at 552 (9th Cir. 1988). *See also* Shamblin v. Shamblin (*In re* Shamblin), 890 F.2d 123, 126 (9th Cir. 1989).

The broad character of bankruptcy's automatic stay serves several important purposes. By prohibiting all creditors' collection efforts after the debtor has filed a bankruptcy petition, the stay provides the debtor with a "breathing spell" during which the debtor is relieved of financial pressures and is provided time to create a repayment or reorganization plan.[23] Additionally, the stay protects *creditors'* financial interests.[24] Without the stay, those creditors who seek the debtor's assets first will receive payment of their claims in preference to and to the detriment of other creditors.[25] One court has stated that "the stay protects creditors by preventing particular creditors from acting unilaterally in self-interest to obtain payment from a debtor to the detriment of other creditors. . . . In other words, the stay 'protects the bankrupt's estate from being eaten away by creditors' lawsuits and seizures of property before the trustee has had a chance to marshal the estate's assets and distribute them equitably among the creditors.'"[26] Section 362's legislative history also emphasizes that "[b]ankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that."[27]

As the automatic stay serves the interests of both debtors *and* creditors, the majority of courts have held that the triggering of the stay *may not be waived or limited in scope by either a creditor or a debtor.*[28] In fact, several courts have emphasized that the stay, being automatic, attaches "even when the debtor, by his own dereliction, fails to invoke it."[29]

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23. H.R. REP. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6296-97 (The "breathing spell" is important as it gives the bankruptcy trustee the opportunity to inventory the debtor's position before proceeding with the administration of the case.); *Maritime,* 959 F.2d at 1204; Association of St. Croix Condo. Owners v. St. Croix Hotel, 682 F.2d 446, 448 (3d. Cir. 1982).

24. H.R. REP. No. 595.

25. *Id.*; Parr Meadows Racing Ass'n. v. Suffolk County Treasurer (*In re* Parr Meadows Racing Ass'n.), 880 F.2d 1540, 1545 (2d Cir. 1989), *cert. denied,* 493 U.S. 1058 ("The automatic stay is a crucial provision of bankruptcy law. It prevents disparate actions against debtors and protects creditors in a manner consistent with the bankruptcy goal of equal treatment."); Hunt v. Bankers Trust Co., 799 F.2d 1060, 1069 (5th Cir. 1986).

26. *Maritime,* 959 F.2d at 1204 (quoting Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n., 892 F.2d 575, 577 (7th Cir. 1989)).

27. H.R. REP. No. 595.

28. *Maritime,* 959 F.2d at 1204. *See also* Commerzanstalt v. Telewide Sys., Inc., 790 F.2d 206, 207 (2d Cir. 1986) ("Since the purpose of the stay is to protect creditors as well as the debtor, the debtor may not waive the automatic stay."); Association of St. Croix Condo. Owners v. St. Croix Hotel, 682 F.2d 446, 448 (1982); *In re* Best Finance Corp., 74 B.R. 243, 245 (D. P.R. 1987).

29. University Medical Ctr. v. Bowen (*In re* University Medical Center), 93 B.R. 412, 416-17 (Bankr. E.D. Pa. 1988) (sending letters and making an oral arrangement with the debtor after the debtor filed for bankruptcy by which the debtor would repay pre-petition obligations violated the automatic stay even though the debtor acceded to the payments). *See also* Taras v. Commonwealth Mortgage Corp. of America (*In re* Taras), 136 B.R. 941, 947-48 (Bankr. E.D. Pa. 1992) ("The effect of the stay cannot be compromised, even by the debtor, because it protects not only the debtor, but all parties interested in a bankruptcy proceeding."); *In re* Shapiro, 124 B.R. 974, 981 (Bankr. E.D. Pa. 1991); *In re* Clark, 69 B.R. 885, 889 (Bankr. E.D. Pa. 1987), *modified on other grounds,* 71 B.R. 747 (Bankr. E.D. Pa. 1987) (It is clear "that a court not only may, but *must,* raise the issue that an automatic stay attaches *sua sponte* if the parties, included the debtor, fail to do so.") (emphasis in original).

To receive relief from the stay, a creditor must file a motion pursuant to Bankruptcy Rule 9014 requesting that relief be granted.[30] Only the bankruptcy court with jurisdiction over a debtor's case is authorized to grant a creditor relief from the stay to allow that creditor to pursue an action against the debtor.[31] A bankruptcy court's exclusive jurisdiction to grant relief from the stay is necessary "to prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general to avoid interference with the orderly liquidation or rehabilitation of the debtor."[32] Section 362(d) provides that a court may grant relief from the stay only if it finds that one of two conditions is met. First, a court may grant relief for cause, including the lack of adequate protection of an interest in property of such party in interest.[33] Second, a court may grant relief with respect to a stay of an act against property if the debtor does not have equity in such property and such property is not necessary to an effective reorganization.[34] Absent relief from the stay, judicial actions and proceedings against the debtor are void ab initio.[35]

Extending section 362(d)'s scope, a limited number of courts have held that the existence of a pre-bankruptcy waiver of the automatic stay between a debtor and one of its creditors constitutes sufficient "cause" pursuant to section 362(d)(1) to provide that creditor relief from the stay.[36] Thus, a small minority of courts have essentially enforced pre-petition waivers of the automatic stay. The merit of such decisions comprises the essence of this article.

II. The Debtor's Right to Contract Away the Bankruptcy Code's Automatic Stay

Over the past several years, a select number of courts have addressed the enforceability at law of a pre-bankruptcy contract that purports to exempt one party from the automatic stay by providing immediate relief from the stay upon the debtor's filing for bankruptcy.[37] Several bankruptcy judges, primarily in the Northern and Middle Districts of Florida and the Northern District of Georgia, have enforced contracts negotiated and signed pre-petition that

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30. 2 Collier On Bankruptcy ¶ 362.07, at 362-73 (15th ed. 1993).

31. 11 U.S.C. § 362(d) (1988); *Maritime,* 959 F.2d at 1204; Cathey v. Johns-Manville, 711 F.2d 60, 62-63 (6th Cir. 1983), *cert. denied,* 478 U.S. 1021 (1986) ("[T]he legislative history of § 362(d) unambiguously identifies the bankruptcy court as the exclusive authority to grant relief from the stay . . . ."); Holtkampp v. Littlefield (*In re* Holtkamp), 669 F.2d 505, 507 (7th Cir. 1982) (Section 362(d) "commits the decision of whether to lift the stay to the discretion of the bankruptcy judge.").

32. *St. Croix,* 682 F.2d at 448.

33. 11 U.S.C. § 362(d)(1) (1988).

34. 11 U.S.C.§ 362(d)(2) (1988); 2 Collier Bankruptcy ¶ 362.07, at 362-61 (15th ed. 1993).

35. *Maritime,* 959 F.2d at 1206. *See also* Shamblin v. Shamblin (*In re* Shamblin), 890 F.2d 123, 125 (9th Cir. 1989) ("Judicial proceedings in violation of [the] automatic stay are void."); *In re* Ward, 837 F.2d 124, 126 (3d Cir. 1988); Stringer v. Huet (*In re* Stringer II), 847 F.2d 549, 551 (9th Cir. 1988).

36. *See infra* Part II.

37. Enforcing the contract in this situation simply means that a court will find sufficient "cause" pursuant to section 362(d)(1) to grant relief from the automatic stay based merely on the fact that the parties had a prior agreement for relief from the stay if the debtor filed for bankruptcy. *See supra* note 33 and accompanying text.

purport to exempt a creditor from the broad scope of the stay. As is shown *infra*, courts should refuse to enforce such agreements.[38]

A. The Club Tower Decision.

In re Club Tower L.P.[39] is a recent decision in which the court enforced a pre-bankruptcy waiver of the automatic stay. In *Club Tower*, the debtor and TRST (the creditor) entered into a permanent loan agreement whereby TRST agreed to lend the debtor up to $39 million for the purpose of providing permanent financing for the debtor's luxury high-rise apartment building.[40] In September, 1990, the debtor defaulted on its obligation to TRST under the permanent loan agreement.[41] Following workout negotiations, the debtor and TRST entered into an agreement in February of 1991 (the "forbearance agreement") whereby TRST agreed to forbear exercising its rights and remedies as a secured creditor until May 31, 1991, provided that the debtor was successful in raising $1 million in new equity to cover deferred payments of interest on the $39 million loan.[42]

As part of the forbearance agreement, the debtor agreed that TRST would be entitled to immediate relief from bankruptcy's automatic stay in the event that the debtor filed a bankruptcy petition under the Bankruptcy Code.[43] On June 6, 1991, after failing to pay TRST under its prior agreement, the debtor filed for bankruptcy pursuant to Chapter 11.[44] Following the debtor's filing of the bankruptcy petition, TRST moved the court for relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) and argued that the debtor acted in "bad faith" by filing for bankruptcy.[45] As an alternative argument for relief from the stay, TRST maintained that the court should grant it relief based upon the parties' prior agreement to lift the stay if the debtor ever filed for bankruptcy.[46]

In a remarkable decision, Judge Robinson enforced the parties' pre-petition agreement and granted TRST relief from the automatic stay.[47] Judge Robinson concluded that because the *Club Tower* debtor agreed to waive only *a single benefit* of the Bankruptcy Code (the automatic stay) and did not waive *all of the rights and benefits* provided by the Code, the agreement did not violate public policy concerns such as the need to grant the debtor to make a "fresh start" following bankruptcy.[48] The judge distinguished the pre-petition agreement

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38. *See infra* Parts III and IV.

39. 138 B.R. 307 (Bankr. N.D. Ga. 1991).

40. *Id.* at 308.

41. *Id.*

42. *Id.* at 308-09.

43. *Id.* at 309. Specifically, the clause stated that in the event the debtor files for bankruptcy, TRST "shall thereupon be entitled to relief from any automatic stay imposed by Section 362 of Title 11 of the U.S. Code, as amended, or otherwise, on or against the exercise of the rights and remedies otherwise available to [TRST]." *Id.* at 310-11.

44. *Id.* at 309.

45. *Id.*

46. *Id.*

47. *Id.* at 310.

48. *Id.* at 311-12. In emphasizing that the debtor still had most of the Bankruptcy Code's provisions at its disposal, the court in *Club Tower* stated that:

> [the] Debtor still retains the benefits of the automatic stay as to other creditors, as well as all the other

in *Club Tower* from an agreement which completely prohibited a debtor from *ever* filing a bankruptcy petition, holding that the former was valid while the later was not.[49]

As support for his holding, Judge Robinson also noted that "[n]o provision in the Bankruptcy Code guarantees a debtor that the stay will remain in effect throughout the bankruptcy case. To the contrary, Congress specifically provided creditors a means for obtaining relief from [the] stay."[50] The judge added that "enforcing pre-petition settlement agreements furthers the legitimate public policy of encouraging out of court restructurings and settlements,"[51] particularly where the debtor has only one asset. Therefore, the judge concluded that refusing to enforce the pre-petition agreement between the debtor and TRST "could make lenders more reticent in attempting workouts with borrowers outside of bankruptcy."[52] As is shown *infra,* there are several flaws with Judge Robinson's approach.[53]

B. Cases in Agreement With Club Tower—Citadel and Orange Park.

Only a handful of cases can be reconciled with Judge Robinson's holding in *Club Tower*. One such case is *In re Citadel Properties, Inc.*[54] in which Judge Proctor enforced a pre-petition agreement providing relief from the automatic stay.[55] In *Citadel,* the debtor defaulted under its obligations to a creditor in mid-1985.[56] The two parties subsequently entered into a settlement agreement in which the debtor agreed that the creditor would be entitled to immediate relief from the automatic stay should the debtor file for bankruptcy.[57] In return for this promise, the creditor agreed to forbear enforcing a foreclosure judgment that it had previously received.[58]

The *Citadel* court held that the settlement agreement was binding on the parties and that the existence of the agreement constituted sufficient "cause" pursuant to section 362(d)(1) to grant the creditor relief from the stay.[59] In support of its holding, the court cited to prior cases for the proposition that pre-petition agreements regarding relief from the stay are

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> benefits and protections provided by the Bankruptcy Code including but not limited to the right to conduct an orderly liquidation, discharge debt or pay it back on different terms, assume or reject executory contracts, sell property free and clear of liens, and pursue preferences and fraudulent conveyance claims.

Id. at 311.

49. *Id.*

50. *Id.*

51. *Id.* at 312 (citing *In re* Colonial Ford, Inc., 24 B.R. 1014 (Bankr. D. Utah 1982)). Judge Robinson noted that where there is a debt between two parties and the debt only involves one asset, "filing for bankruptcy should be a last resort." *Club Tower*, 138 B.R. at 312.

52. *Club Tower*, 138 B.R. at 312.

53. *See infra* Parts III and IV.

54. 86 B.R. 275 (Bankr. M.D. Fla. 1988).

55. *Id.* at 277.

56. *Id.* at 275.

57. *Id.*

58. *Id.*

59. *Id.* at 276.

enforceable.[60] The court also inferred that the stipulation did not violate public policy since it did not completely prohibit the debtor from filing for bankruptcy.[61]

In a similar case, *In re Orange Park South Partnership,*[62] the debtor and creditor agreed prior to any filing that any future bankruptcy filing by the debtor would be "admitted to be totally unfounded and . . . for the purpose of delay."[63] Such a stipulation essentially grants the creditor relief from the automatic stay since an "unfounded" or "bad faith" bankruptcy filing is sufficient grounds for a court to grant relief from the stay for "cause" pursuant to section 362(d)(1).[64] In holding that the pre-petition agreement was valid, Judge Paskay emphasized that the agreement had not been rescinded under the laws of contract: "there is absolutely nothing in this record which would warrant the conclusion that the stipulation was obtained either by coercion, fraud or by mutual mistake of material facts which have been traditionally recognized as the only valid bases to rescind an agreement."[65] Notwithstanding this analysis, Judge Paskay failed to address the detrimental impact his decision would have on debtor and creditor protection in future bankruptcy proceedings. Specifically, the judge never contemplated that enforcing agreements which waive the benefits of the automatic stay could establish precedent for future decisions in which the court considers enforceing of waivers of other Bankruptcy Code provisions necessary for the orderly administration of a debtor's estate, such as the debtor's right to a "fresh start" following bankruptcy.[66] Nevertheless, relying on *Citadel* and *Orange Park*, several judges continue to enforce pre-petition agreements or stipulations that purport to relieve a creditor from the scope of the automatic stay.[67]

C. Recent Decisions that have Enforced Waivers of the Automatic Stay

In the recent case of *In re Aurora Investments, Inc.,*[68] Judge Paskay enforced a stipulation in which the debtor and its principals acknowledged that if they filed for

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60. *Id.* at 276. Specifically, the court cited *In re* International Supply Corp., 72 B.R. 510 (Bankr. M.D. Fla. 1987); *In re* Gulf Beach Dev. Corp., 48 B.R. 40 (Bankr. M.D. Fla. 1985); and B.O.S.S. Partners v. Tucker (*In re* B.O.S.S. Partners I), 37 B.R. 348 (Bankr. M.D. Fla. 1984) as supports for the proposition that pre-petition agreements regarding relief from the stay were enforceable in bankruptcy. *Citadel,* 86 B.R. at 276. Although the judge cited these cases as support for his proposition, *none* of these cases actually supports the claim that pre-petition waivers of the automatic stay are enforceable in bankruptcy. *See infra* subpart III.A. for a discussion of these cases.

61. *Citadel,* 86 B.R. at 275. This was similar to Judge Robinson's analysis in *Club Tower. See supra* notes 48-49 and accompanying text.

62. 79 B.R. 79 (Bankr. M.D. Fla. 1987).

63. *Id.* at 80-81.

64. *See* Phoenix Picadilly, Ltd. v. Life Ins. Co. of Virginia (*In re* Phoenix Picadilly, Ltd.), 849 F.2d 1393, 1394 (11th Cir. 1988) ("An automatic stay may be terminated for 'cause' pursuant to section 362(d)(1) of the Bankruptcy Code if a petition was filed in bad faith."); Natural Land Corp. v. Baker Farms, Inc. (*In re* Natural Land Corp.), 825 F.2d 296 (11th Cir. 1987) (court affirmed lifting of automatic stay where petition was filed in bad faith).

65. *Orange Park,* 79 B.R. at 82.

66. *See infra* notes 115-17 and accompanying text.

67. *See infra* subpart II.C.

68. 134 B.R. 982 (Bankr. M.D. Fla. 1991).

bankruptcy, such filing would be in bad faith.[69] In enforcing the stipulation, the judge, as he had done in *Orange Park*, applied contract law and stated that because the agreement was not obtained by coercion, fraud, or mutual mistake of material facts, the traditional bases to contractual recession, the parties could not escape the legal consequences of the agreement.[70]

In another recently decided case, *In re Hudson Manor Partners, Ltd.*,[71] Judge Robinson held that the existence of a settlement agreement, in which a creditor was entitled to immediate relief from the automatic stay if the debtor filed for bankruptcy, constituted "cause" to grant relief from the stay pursuant to section 362(d)(1).[72] As he did in *Club Tower,* Judge Robinson noted that the agreement was valid and did not violate public policy since it did not completely prohibit the debtor from filing for bankruptcy.[73] Therefore, the judge reasoned, the debtor had full protection of the Bankruptcy Code with respect to the rest of its creditors.[74]

III. Arguments Against Enforcing Pre-Petition Agreements That Waive the Automatic Stay

A. The Lack of Well-Reasoned Precedent Supporting Decisions to Enforce Pre-Petition Waivers of the Automatic Stay Has Led to Slipshod and Faulty Analysis in Similar Contemporary Cases.

Very few courts have enforced pre-petition agreements that purport to grant a creditor instant relief from the automatic stay in a future bankruptcy proceeding. As a result, the courts that *have* enforced such agreements must cite a limited number of poorly decided cases with a similar holding, or cite no cases at all in support of their decision.[75]

For instance, in *In re Citadel,* Judge Proctor erroneously cited several cases in an effort to justify enforcing an independent pre-petition agreement that purported to waive the automatic stay. *None* of the three cases which Judge Proctor cited support such an enforcement. The first case the judge cited, *In re International Supply Corp. of Tampa,*[76] involved a court-approved agreement providing only that if the debtor and the creditor did

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69. *Id.* at 986. Such a stipulation, if enforced, essentially grants the creditor relief from the automatic stay automatically, since a bad faith filing is enough to grant relief from the automatic stay for "cause." *See supra* note 64 and accompanying text.

70. *Aurora,* 134 B.R. at 986. Judge Paskay employed the same "lack of rescission" argument in *Orange Park. See supra* note 65 and accompanying text.

71. 1991 WL 472592 (Bankr. N.D. Ga. 1991).

72. *Id.* at *2. As he did *Club Tower,* Judge Robinson cited *Citadel* and *Orange Park* as support for his holding in *Hudson. Id.*

73. *Id.* at *2.

74. *Id.*

75. Although it might be necessary for a court to cite few or no cases in support of a holding contemplating an issue of first impression, the courts that have enforced pre-petition waivers of the stay have cited cases that clearly do not support their holdings. *See infra* notes 76-87 and accompanying text. Because the initial cases enforcing pre-petition waivers of the stay were improperly reasoned and because the majority of subsequent cases that enforced such waivers cite to the initial cases for support, the entire line of reasoning behind the cases that have enforced pre-petition waivers of the stay is suspect.

76. 72 B.R. 510 (Bankr. M.D. Fla. 1987).

not sell a piece of property by a certain date, the county court would enter a judgment of eviction with the right to immediate possession of property.[77] The pre-petition agreement in *International Supply*, unlike the agreement in *Citadel,* failed to discuss what relief would be available to the creditor if the debtor filed for bankruptcy. Furthermore, the pre-petition agreement in *International Supply* never even addressed the *possibility* of filing for bankruptcy.[78] Thus, *International Supply* lends no support to the notion that pre-petition agreements that purport to waive the automatic stay in bankruptcy are enforceable since the agreement in *International Supply* never contemplated a bankruptcy filing in the first place.

Another case that the *Citadel* Court cited in support of its proposition, *B.O.S.S. Partners I v. Tucker,*[79] did not involve a pre-petition agreement. Instead, the case concerned a *post*-petition agreement.[80] Moreover, the post-petition agreement in *B.O.S.S.*, did not mention the possibility of relief from the automatic stay.[81] Instead, the *court* in *B.O.S.S.,* rather than the parties themselves, adopted the post-petition agreement in an order that automatically granted the creditor relief from the automatic stay if the debtor failed to satisfy certain conditions.[82]

The court's post-filing approval of the agreement in *B.O.S.S.* distinguishes that case from the unapproved agreement in *Citadel.* Court approval of an agreement waiving a Bankruptcy Code provision is significant since the court, as an unbiased and unprejudiced overseer of the debtor's creditors and assets, is in the best position to weigh a creditor's need for relief from the stay against the need to protect the assets of the bankruptcy estate for distribution to creditors as a whole.[83] Permitting parties to contract for relief from stay prior

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77. *Id.* at 511.

78. As in *International Supply*, in another case that Judge Proctor cited as authority, *In re Gulf Beach Dev. Corp.*, the pre-petition agreement between the debtor and the creditor failed to *contemplate* the consequences of either party filing for bankruptcy. 48 B.R. 40, 42 (Bankr. M.D. Fla. 1985). *Gulf Beach*, like *International Supply*, lends no support for enforcing pre-petition waivers of the stay.

79. *(In re* B.O.S.S. Partners I), 37 B.R. 348 (Bankr. M.D. Fla. 1984).

80. *Id.* at 349. The Debtors in *B.O.S.S.* filed a Chapter 11 petition on November 10, 1992. *Id.* On May 26, 1983, a creditor sought relief from the automatic stay. *Id.* The court scheduled a preliminary hearing to determine if the stay should be lifted, but prior to the hearing the parties entered into a joint stipulation that was approved by the Bankruptcy Court. *Id.* Thus, the joint stipulation in B.O.S.S. was entered postpetition, as opposed to the prepetition agreement at issue in *Club Tower, Citadel, and Orange Park. See supra* note 79 and accompanying text.

81. *B.O.S.S.*, 37 B.R. at 349. Specifically, the stipulation stated that the debtor will have until a certain time to sell a piece of property and thereafter pay a debt owed to a creditor. *Id.*

82. *Id.*

83. Association of St. Croix Condo. Owners v. St. Croix Hotel, 682 F.2d at 446, 448 (3d. Cir. 1982) ("Because it is the bankruptcy judge who is the most knowledgeable about the debtor's affairs, and about the effect that any judicial proceeding would have on the debtor's reorganization, it is essential that he make the determination as to whether an action against the debtor may proceed or whether the stay against such actions should remain in effect.").

Other courts have also enforced court-approved, pre-petition agreements that waive the automatic stay. *See In re* Wheaton Oaks Office Partners, 1992 WL 381047 (E.D. Ill. Dec. 10, 1992). In *Wheaton Oaks*, the district court affirmed the bankruptcy court's approval of a pre-petition reorganization plan and permitted a creditor to foreclose on a debtor's property in spite of the automatic stay. *Id.* at *1. The district court in *Wheaton Oaks* noted

to bankruptcy, without court approval, would allow creditors to circumvent the bankruptcy judge's role of protecting creditors as a whole from consuming the debtor's assets to their own detriment.[84] Thus, enforcing a *post*-petition court order granting relief from the stay, in which the court considered the various positions of the debtor and a creditor before issuing that order, is completely distinguishable from enforcing a pre-petition agreement between a debtor and creditor that waives the automatic stay. For this reason, *B.O.S.S.*, like *Gulf Beach* and *International Supply*, does not support the *Citadel* court's proposition that pre-petition agreements, granting a specific creditor relief from the automatic stay, are enforceable in bankruptcy. In sum, the court in *Citadel* failed to cite a *single case* that enforced a pre-petition agreement regarding relief from the automatic stay.

Similar slipshod analysis was apparent in *Orange Park*, where Judge Paskay did not cite a single case supporting the proposition that pre-petition waivers of the automatic stay are enforceable in bankruptcy.[85] The judge merely stated that the agreement in that case must be enforceable since it had not been rescinded and cited a case for that proposition.[86] Although such a proposition might be true in many circumstances, Judge Paskay never addressed the precedent-setting consequences of enforcing an agreement that would avoid Congressionally mandated bankruptcy provisions.[87] Without addressing these important public policy concerns, Judge Paskay's analysis in *Orange Park* was incomplete and, thus, unreliable.

B. Enforcing Pre-petition Waivers of the Stay Violates Public Policy.

In addition to the dearth of authority and precedent supporting a court's enforcement of a pre-petition agreement that waives the automatic stay, the *policy* behind the entire Bankruptcy Code supports the notion that a debtor *may not* contract away the right to automatic stay's protection in a pre-petition agreement. Judge Markovitz clearly presented such an argument in *In re Sky Group International, Inc.*[88] In *Sky Group,* Judge Markovitz ruled that a debtor's waiver of the automatic stay "is not self-executing under the Bankruptcy Code. Relief from stay *must be authorized* by the Bankruptcy Court."[89]

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that the "key to the analysis" was the fact that the bankruptcy court played a large role not only in approving the reorganization plan, but also in determining that the existence of the pre-petition plan itself was sufficient "cause" for relief from the stay. *Id.* at *1-2. In other words, the bankruptcy court's large role in both approving the pre-petition waiver and in determining "cause" for relief from the stay pursuant to section 362(d) eliminated the possibility of enforcing the pre-petition waiver without substantial scrutiny by a neutral and unbiased party, namely, the court. Thus, cases in which the bankruptcy court has approved the pre-petition waiver are distinguishable from cases in which the waiver was not court-approved.

84. H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6296-97. *See supra* notes 8-9 and accompanying text.

85. *Orange Park,* 79 B.R. at 82.

86. *Id.*

87. *See infra* notes 115-17 and accompanying text.

88. 108 B.R. 86 (Bankr. W.D. Penn. 1989).

89. *Id.* at 89 (emphasis added). Other courts have also held that waivers of the automatic stay are not enforceable in bankruptcy. *See supra* note 28 and accompanying text.

In *Sky Group*, two parties entered into a pre-petition agreement in which the debtor explicitly agreed to waive his right to the automatic stay with respect to one creditor in the event the debtor filed for bankruptcy.[90] The *Sky Group* court specifically held that "[t]he contention that this 'waiver' is enforceable and self-executing is without merit."[91] To support its holding, the court examined the automatic stay's legislative history, which emphasizes the need for both an equal treatment of creditors and also an orderly liquidation procedure.[92] In determining that the policies of equal treatment and an orderly liquidation procedure would be violated if the court were to enforce a pre-petition waiver of the stay, Judge Markovitz stated:

> To grant a creditor relief from stay simply because the debtor elected to waive the protection afforded the debtor by the automatic stay ignores the fact that it also is designed to protect *all creditors* and to treat them *equally*. The orderly liquidation procedure contemplated by the Code would be placed in jeopardy, especially where (as here) none of the creditors who brought the involuntary petition was a party to the Agreement in which the debtor allegedly waived its right to the automatic stay.[93]

Sky Group is only one of many courts that have held that waivers of the automatic stay are not enforceable in bankruptcy.[94] In a recent district court decision, *Farm Credit of*

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90. *Sky Group*, 108 B.R. at 88. Specifically, the clause in the agreement provided as follows:

> Relief from Stay. In the event that a proceeding under any bankruptcy or insolvency law is commenced by or against [the debtor] and an order for relief is entered as a result of such petition, [the debtor] hereby consents to relief from the automatic stay imposed by 11 U.S.C. § 362 to allow [the creditor] to exercise its rights and remedies hereunder with respect to the Debtor's property.

Id.

91. *Id. See also In re* Best Fin. Corp., 74 B.R. 243, 245 (D. P. R. 1987) ("A debtor cannot waive the automatic stay, since the purpose of its enactment by Congress was not only to protect debtors and creditors, but also to provide an orderly and efficient administration of a bankruptcy estate.") (quoting *In re* Nashville White Trucks, Inc. 22 B.R. 578 (Bankr. M.D. Tenn. 1982)); Yorke v. Citibank (*In re* BNT Terminals, Inc.), 125 B.R. 963, 971 (Bankr. N.D. Ill. 1990) (Unauthorized acts by debtors or creditors outside the provisions of the Bankruptcy Code "would make a nullity of § 362 and what it attempts to accomplish as well as invite horrendous fraud upon the court.").

92. *See supra* note 27 and accompanying text. The court in *Sky Group* stated:

> The legislative history makes it clear that the automatic stay has a dual purpose of protecting the debtor and all creditors alike: It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure action. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy. The automatic stay also provides creditors protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. . . .

108 B.R. at 88-89 (Citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6296-97).

93. *Id.* at 89 (emphasis added).

94. *See supra* note 28 and accompanying text.

Central Florida v. Polk,[95] the court refused to enforce a pre-petition agreement that waived the automatic stay, specifically holding that the debtor may not unilaterally waive the automatic stay against the interest of his creditors.[96] In determining that such agreements are not self-executing, the court stated:

> [T]he Bankruptcy Court's holding that pre-petition agreements providing for the lifting of the stay are 'not per se binding on the debtor, as a public policy position,' is consistent with the purposes of the automatic stay to protect the debtor's assets, provide temporary relief from creditors and promote equality of distribution among the creditors by forestalling a race to the courthouse.[97]

In so holding, the *Farm Credit* Court rejected the applicability of the *Citadel* line of cases,[98] stating that the fact patterns existing therein (single asset bankruptcies with very few creditors) were not present in *Farm Credit*.[99]

The broad scope of the stay and the policy behind it indicates that no court should enforce a pre-petition waiver of the stay that would function to the detriment of creditors not party to that agreement.[100] If the entire bankruptcy proceeding consists of one debtor and one creditor, as was essentially the case in *Club Tower*, the bankruptcy case should be dismissed altogether rather than continued without the protections of the automatic stay.[101]

C. As the Bankruptcy Court May Not Grant Relief From the Automatic Stay Prior to the Commencement of the Bankruptcy Proceeding, Independent Parties Surely May Not Contract Out of the Stay Prior to the Filing of a Bankruptcy Petition.

A debtor who has filed for bankruptcy might be forced to file for bankruptcy again a few years down the road as a result of a bad business judgment or an inability to pay debts as they come due. One question that results from consecutive filings is the effect of a bankruptcy court order in the first case that purports to grant relief from the automatic stay in any future bankruptcy proceeding involving the same debtor. In answering that question, several courts have held that a bankruptcy court *may not* grant a specific creditor relief from the automatic stay in advance of the debtor's filing for bankruptcy.[102] The policy of prohibiting a bankruptcy court from granting a creditor relief from the automatic stay in *future* bankruptcy proceedings applies equally to the case of two independent parties attempting to effectuate the same result.

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95. 160 B.R. 870 (M.D. Fla. 1993).

96. *Id.* at 873.

97. *Id.*

98. *See supra* notes 76-82.

99. 160 B.R. at 872.

100. *See supra* notes 92-93 and accompanying text.

101. *See infra* subpart IV.B.

102. *See, e.g.*, *In re* Norris, 39 B.R. 85, 87 (E.D. Penn. 1984).

Consider *In re Norris*[103] in which a creditor moved for relief from the automatic stay to foreclose on a mortgage following the debtor's filing for bankruptcy.[104] The bankruptcy court in *Norris* not only granted that creditor relief from the stay, but issued an order stating that "the filing of *any future petitions in bankruptcy shall not affect* the instant Order granting relief from the Code Section 362 stay."[105] The order in *Norris*, if enforced, would grant the creditor instant relief from the automatic stay if the debtor filed for bankruptcy in the future. On appeal, the district court modified the court order so that the creditor was *not* entitled to instant relief from the stay if the debtor ever again filed for bankruptcy.[106] In modifying the bankruptcy court order, the district court stated:

> [T]here is nothing in the statutory language [of section 362(d)] which purports to enable the Bankruptcy Court to provide relief from the automatic stay in advance of the filing of the bankruptcy petition. That is, on its face, the statute makes the stay automatic in all bankruptcy proceedings. In my view, a bankruptcy judge in a pending proceeding simply does not have the power to determine that the automatic stay shall not be available in subsequent bankruptcy proceedings.[107]

Other courts, in accord with *Norris*, have similarly refused to enforce court orders in prior bankruptcy proceedings brought by the same debtor.[108] Thus, considering the fact that "a bankruptcy judge in a pending proceeding does not have the power to determine that the automatic stay shall not be available in subsequent bankruptcy proceedings,"[109] it follows that *independent parties* acting outside the scope of the court also should not be permitted to contract pre-petition for relief from the stay.[110]

D. The Bankruptcy Code's Flexibility in Affording a Creditor Relief from the Automatic Stay Weighs Against Enforcing Pre-Petition Agreements that Waive the Stay.

If relief from the stay is warranted under Bankruptcy Code section 362(d)'s "cause" standard,[111] the bankruptcy court should grant relief for "cause" rather than enforce a pre-petition waiver of the stay. Pursuant to Bankruptcy Code section 362(d), a creditor may move for relief from the stay, and the bankruptcy court will determine whether sufficient

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103. *Id.*

104. *Id.* at 86.

105. *Id.* (emphasis added).

106. *Id.* at 88.

107. *Id.* at 87.

108. *See In re* Taras, 136 B.R. 948; Taylor v. Tsaforoff (*In re* Taylor), 77 B.R. 237, 240 (Bankr. 9th Cir. 1987), *aff'd in part & rev'd in part on other grounds*, 884 F.2d 478 (9th Cir. 1989) ("Even if this Panel accepts Mr. Little's argument that the intent of the order lifting the automatic stay [in a prior case] was to apply to any and all Chapter 13 petitions filed by the debtor, it is doubtful that a bankruptcy court can enter such an order.").

109. *Norris*, 39 B.R. at 87.

110. *See supra* notes 89-93 and accompanying text. Since the bankruptcy court is in a better position to weigh the needs of the debtor and creditors than two independent parties, if a bankruptcy court could not grant relief to a creditor pre-petition, surely parties acting outside the scope of the court may not contract for that result.

111. *See supra* note 33 and accompanying text.

"cause" exists to warrant that relief.[112] Bankruptcy Code section 362(d) affords the bankruptcy judge flexibility in determining whether relief from the automatic stay is warranted for "cause."[113] As a result of this flexibility, a bankruptcy judge will almost certainly be able to find "cause" to grant a creditor relief from the stay, if relief from the stay is warranted, while ignoring the effect of a pre-petition agreement between the parties that purports to relieve a creditor of the stay.[114]

If a creditor's situation truly warrants relief from the stay under the broad discretionary "cause" standard, the bankruptcy court should grant the relief regardless of whether the creditor entered into a pre-petition agreement providing for such relief. Enforcing waivers of the automatic stay could inevitably lead down the slippery slope of enforcing waivers of other Congressionally mandated Bankruptcy Code provisions, such as the debtor's right to a "fresh start" following bankruptcy.[115] As a result, the Bankruptcy Code's purpose of

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112. *See supra* note 33 and accompanying text.

113. Norton v. Hoxie State Bank, 61 B.R. 258, 260 (D. Kan. 1986) ("The 'cause' standard is broad and extends beyond the concept of a lack of adequate protection mentioned in the statute."); Elliott v. Hardison, 25 B.R. 305, 310 (Bankr. E.D. Va. 1982) ("As a court of equity the bankruptcy court has broad powers to balance the hardships to the affected parties and to fashion relief from the automatic stay accordingly.").

114. For example, a debtor's "bad faith" filing of a bankruptcy petition is sufficient for a court to find "cause" for relief from the stay under section 362(d). *See supra* note 63 and accompanying text. *See also* Shell Oil Co. v. Waldron (*In re* Waldron), 785 F.2d 936 (11th Cir. 1986); *In re* Albany Partners, Ltd., 749 F.2d 670, 675 (11th Cir. 1984).

115. Pre-petition waivers of bankruptcy's "fresh start" provisions have typically been held void as against public policy. *See* Klingman v. Levinson, 831 F.2d 1292, 1296 n.3 (7th Cir. 1987) ("For public policy reasons, a debtor may not contract away the right to a discharge in bankruptcy."); Alsan Corp. v. DiPierro (*In re* DiPierro), 69 B.R. 279, 282 (Bankr. W.D. Penn 1987) ("A debtor cannot contract away the right to a bankruptcy discharge in advance of the bankruptcy filing."); *In re* Markizer, 66 B.R. 1014, 1018 (Bankr. S.D. Fla. 1986) ("Paragraph 9 of the agreement will be given no effect because it is unenforceable. An agreement to waive the benefit of a discharge in bankruptcy is wholly void, as against public policy."); *In re* Crowder, 37 B.R. 53, 55 (Bankr. S.D. Fla. 1984) ("The State court's reliance upon a pre-bankruptcy waiver of the debtor's federal statutory right to discharge a debt is an obviously erroneous ruling, or so it would appear."); George v. George (*In re* George), 15 B.R. 247, 248-49 (Bankr. N.D. Ohio 1981) (Pre-bankruptcy waivers of dischargeability are unenforceable as "being in conflict with the purposes of the Bankruptcy Laws."); Johnson v. Kriger (*In re* Kriger), 2 B.R. 19, 23 (Bankr. D. Ore. 1979) ("It is a well settled principle that an advance agreement to waive the benefit of a discharge in bankruptcy is wholly void, as against public policy.").

In the seminal case on pre-petition waivers of a debtor's "fresh start," the Supreme Judicial Court of Massachusetts, in *Federal National Bank v. Koppel,* stated:

> It would be repugnant to the purpose of the Bankruptcy Act to permit the circumvention of its object by the simple device of a clause in the agreement, out of which the provable debt springs, stipulating that a discharge in bankruptcy will not be pleaded by the debtor. The Bankruptcy Act would in the natural course of business be nullified in the vast majority of debts arising out of contracts, if this were permissible. *It would be vain to enact a bankruptcy law with all its elaborate machinery for settlement of the estates of bankrupt debtors, which could so easily be rendered of no effect.*

Koppel, 148 N.E. 379, 380 (1925) (emphasis added). *Accord, In re* Weitzen, 3 F. Supp. 698, 698 (S.D.N.Y. 1933). *See also* Fallick v. Kehr, 369 F.2d 899, 904 (2d Cir. 1966).

Thus, the *Koppel* Court held that a pre-bankruptcy waiver of the broad discharge provisions in bankruptcy

providing an orderly reorganization or liquidation process would be diminished. Parties could determine their own fate by contracting for whatever relief they desire without respecting the needs of other similarly situated parties to the bankruptcy proceeding. This would be contrary to the policies of equality that run throughout the entire Bankruptcy Code.[116] To avoid initiating the descent down the slippery slope of enforcing pre-petition waivers of Bankruptcy Code provisions, bankruptcy judges should ignore the existence of pre-petition agreements and employ their broad equitable powers to grant relief from the stay for "causes" that will exist if the creditor truly deserves such relief.[117]

The situation in *Club Tower* illustrates this concept. In that case, Judge Robinson, in enforcing the pre-petition stipulation, also noted that enforcement of the agreement was *unnecessary* since relief from the stay was warranted by the debtor's "bad faith" filing.[118] Yet, if enforcing the agreement was unnecessary, Judge Robinson should have refused to enforce it and simply granted relief for "cause." Instead, Judge Robinson chose to continue a precedent that might be misused by future creditors in their attempt to persuade a court to enforce similar pre-petition relief agreements. Such precedent, if continued, would render the Bankruptcy Code a conglomeration of optional reorganization and liquidation procedures that may be discarded by simple contractual agreements.

IV. The Relationship Between Pre-Petition Contracts That Purport to Waive the Automatic Stay in Future Bankruptcy Proceedings and the Promotion of Workouts and Restructurings

A. Enforcing Pre-Petition Contracts that Purport To Waive the Automatic Stay in Future Bankruptcy Proceeding's does not Promote Workouts and Restructurings.

In *Club Tower,* Judge Robinson, citing *In re Colonial Ford, Inc.,*[119] stated: "Workouts and restructurings should be encouraged among debtors and creditors, particularly where, as here, there is a debt between two parties and a single asset. Under these circumstances, filing for bankruptcy should be a last resort."[120] The judge added that refusing to enforce pre-petition agreements that purported to grant one party relief from the automatic stay could "make lenders more reticent in attempting workouts with borrowers outside of bankruptcy."[121]

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is *not* binding on the promisor because it would essentially render the Code of no effect. 148 N.E. at 379. Along these lines, because Congress enacted the automatic stay to promote both creditor and debtor protection in bankruptcy, permitting parties to contract out of the stay would virtually invalidate one of the most important purposes behind the Code's enactment, that of promoting an orderly liquidation procedure. *See supra* notes 14 and 27 and accompanying text.

116. *See supra* notes 92-93 and accompanying text.

117. *See, e.g., Hardison*, 25 B.R. at 310. One such cause might be a debtor's "bad faith" filing of a bankruptcy petition. *See infra* note 118.

118. *In re* Club Tower L.P., 138 B.R. 307, 310 (Bankr. N.D. Ga. 1991) ("Accordingly, because the Debtor filed this bankruptcy case in bad faith, [the creditor] is entitled to relief from the automatic stay to exercise its rights and remedies as a secured creditor.").

119. 24 B.R. 1014 (D. Utah 1982).

120. *Club Tower*, 138 B.R. at 312.

121. *Id.*

However, the court in *Colonial Ford* never stated, as Judge Robinson contended in *Club Tower,* that enforcing an agreement that waives a Bankruptcy Code provision would promote out-of-court workouts and restructurings. The *Colonial Ford* court did not grant a creditor relief from the stay, but instead *dismissed* the bankruptcy case pursuant to Bankruptcy Code section 305,[122] where an out-of-court pre-petition workout agreement between a debtor and its creditors was comprehensive and designed to end the creditor's relationship with the debtor.[123] The court in *Colonial Ford* suggested that *complete dismissal* of the bankruptcy case pursuant to section 305, in certain situations, would further "the policies of expedition, economy, and good sense."[124]

Furthermore, the agreement in *Colonial Ford,* unlike the agreement in *Club Tower,* provided for *complete* settlement of the debtor's property and a subsequent dismissal of the entire bankruptcy case.[125] In contrast, the pre-petition agreement in *Club Tower* merely provided for *exceptions to bankruptcy* once the debtor filed a bankruptcy petition.[126] Thus, enforcing the *Club Tower* agreement did not promote out-of-court restructurings or settlements, since the parties in *Club Tower* were still enmeshed in a bankruptcy proceeding after the court granted relief from the stay. In *Colonial Ford,* enforcing the agreement permitted the court to dismiss the bankruptcy case completely, thereby promoting workouts and saving administrative expenses. As a result, enforcing the agreement in *Club Tower* did not promote the worthy goal, emphasized in *Colonial Ford,* of avoiding the expenses of filing for bankruptcy by a complete dismissal of the bankruptcy case pursuant to section 305(a).[127]

B. The Dismissal Option in Two-Party Bankruptcies.

Dismissal or abstention of the entire bankruptcy case pursuant to Bankruptcy Code section 305, as ordered in *Colonial Ford,* is a useful alternative to enforcing a pre-petition agreement that waives the automatic stay.[128] In a situation where a debtor owes only one debt to a single party, it is more economical for the court to dismiss the case and let the parties

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122. 11 U.S.C. § 305 (1988). Bankruptcy Code section 305(a) provides in pertinent part that:

> a) the court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
>
> 1) the interests of creditors and the debtor would be better served by such dismissal or suspension . . . .

Id.

123. 24 B.R. at 1023. Specifically, the court stated that where a "workout is comprehensive, and designed to end, not perpetuate, the creditor-company relations, dismissal under section 305(a)(1) is appropriate." *Id.* In dismissing the case pursuant to Bankruptcy Code section 305, the court in *Colonial Ford* emphasized that it would be in the interests of both the creditors and the debtor to dismiss the case. *Id.* at 1020-23.

124. *Id.* at 1023.

125. *Id.* at 1014-15.

126. *Club Tower,* 138 B.R. at 309.

127. *See* 11 U.S.C. § 305 (1988).

128. *Colonial Ford,* 24 B.R. at 1023. Judge Robinson himself admitted that Congress, in enacting Bankruptcy Code section 305, contemplated that bankruptcy "might not always be the most efficient means of restructuring the relations of a debtor and its creditors." *Club Tower,* 138 B.R. at 312.

resolve their dispute in a state court action rather than waste both the debtor's assets and governmental resources by initiating a bankruptcy proceeding.[129] One court has stated:

> [B]ankruptcy courts should become involved in cases only if the bankruptcy court's services are needed to truly reorganize a debtor who is having financial problems; however, if the matter can be dealt with by another forum, better equipped to do it and in a better position to deal with a dispute between two parties or just a few parties, the bankruptcy court should refrain from exercising its jurisdiction.[130]

Following this analysis, numerous courts have held that the filing of a bankruptcy petition to resolve what is essentially a two-party dispute is an implication of a "bad faith" filing and calls for dismissal of the bankruptcy petition pursuant to section 305.[131] Such a dismissal is the logical alternative to enforcing pre-petition agreements that purport to waive the Bankruptcy Code's inherent benefits. Thus, in *Club Tower,* where the dispute involved only one debtor and one creditor and the unsecured claims in that case were not substantial relative to the amount of secured claims, the case was proper for dismissal pursuant to section 305.

Conclusion

When contemplating whether to enforce a pre-petition agreement that automatically grants a creditor relief from the stay, a court should consider a number of factors. First, the legislative history to the automatic stay clearly certifies the bankruptcy court as the only body capable of granting a creditor relief from the stay, indicating that the orderly liquidation procedure contemplated by the Code would be placed in jeopardy if parties are permitted to independently contract out of the stay.[132] Second, the cases that have previously enforced such waivers have not been well reasoned and have ignored the "slippery slope" consequences of their holdings.[133] Third, not even a bankruptcy court may grant a creditor

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129. *In re* Business Information Co., 81 B.R. 382, 387 (Bankr. W.D. Penn. 1988) ("[E]conomy and efficiency of administration must be key considerations in the abstention decision."); *In re* Safon Ochart, 74 B.R. 131, 134 (Bankr. D. P. R. 1986) ("In determining whether to abstain or not the Bankruptcy Court should take into consideration efficiency and economy of administration as primary factors."); *In re* Michael S. Starbuck, Inc., 14 B.R. 134, 135 (Bankr. S.D.N.Y. 1981).

130. *In re* Heritage Estates, Inc., 73 B.R. 511, 513 (Bankr. M.D. Fla. 1987). *See also In re* Noco, Inc., 76 B.R. 839, 844 (Bankr. N.D. Fla. 1987).

131. *In re* Business Information, Co., 81 B.R. 382, 385 (Bankr. W.D. Penn. 1988). *See also* Phoenix Picadilly, Ltd. v. Life Ins. Co. of Virginia *(In re* Phoenix Picadilly, Ltd.), 849 F.2d 1393, 1394-95 (11th Cir. 1988); *In re* Meadowwood Club Apts., Ltd., 145 B.R. 96, 98 (Bankr. M.D. Fla. 1992).

In *Phoenix Picadilly*, the Eleventh Circuit noted several factors that evidence a bad faith filing of a bankruptcy petition. 849 F.3d at 1394-95. These factors included situations where the debtor: 1) has only one asset; 2) as few unsecured creditors whose claims are small in relation to the claims of the secured creditors; 3) has few employees; and, 4) has financial problems that involve essentially a dispute between the debtor and the secured creditors which can be resolved in a pending State Court Action. *Id.* at 1394.

132. *See supra* notes 31 and 89 and accompanying text.

133. *See supra* subpart III.A.

relief from the stay prior to the debtor's filing for bankruptcy.[134] Therefore, since the bankruptcy court represents an unbiased and unprejudiced overseer that is in the best position to weigh a creditor's need for relief from the stay against the need to protect the debtor's assets,[135] two parties acting outside the scope of the bankruptcy court should also not be permitted to waive the stay. Fourth, enforcing pre-petition waivers of the automatic stay in two-party, single-asset bankruptcies does not promote time-saving workouts and settlements.[136] Rather, such cases should be dismissed pursuant to Bankruptcy Code section 305.[137]

Finally, permitting parties to contract out of Bankruptcy Code provisions such as the automatic stay would eventually render the Code a conglomeration of optional laws.[138] As the Bankruptcy Code promotes public policy by providing an orderly liquidation procedure, in part through the automatic stay, parties should not be permitted to render the Code optional by contracting out of its provisions.[139]

Courts should not enforce pre-petition waivers of the automatic stay. If relief from the stay is not warranted, a court should employ its broad equitable powers to find "cause" for relief from the stay pursuant to section 362(d)(1).[140] If the bankruptcy involves a single asset and a single creditor, the court should dismiss the case completely pursuant to section 305.[141]

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134. *See supra* subpart III.D.

135. *See supra* note 83 and accompanying text.

136. *See supra* subpart IV.A.

137. *See supra* subpart IV.B.

138. *See supra* notes 13, 122-131 and accompanying text.

139. *See supra* note 27 and accompanying text.

140. *See supra* note 110 and accompanying text.

141. *See supra* notes 128-30 and accompanying text.

PARTNERS AS COMMON LAW EMPLOYEES

RANDALL J. GINGISS*

INTRODUCTION

In 1991, approximately sixty-one percent of law school graduates entered private practice as associates in law firms.[1] As associates, they are employees of their respective firms. As employees, these associates have certain rights. These rights include the right to workers' compensation if they are injured on the job, the right to participate in qualified pension or profit sharing plans or welfare benefit plans, and the right to be free of discrimination based on sex, religion, national origin, or age. Upon becoming partners, they lose some of these rights because they are no longer considered employees. In the context of discrimination cases under Title VII of the Civil Rights Act of 1964,[2] the Equal Employment Opportunity Commission (EEOC) has argued, for the most part unsuccessfully,[3] that some partners should be accorded the same protection as senior employees of corporations and that other partners, who do not need such protection, can be identified.[4] Partners already receive equal treatment compared to common law employees in qualified pension plans[5] under the Employee Retirement Income Security Act of 1974 (ERISA),[6] but not in welfare benefit plans.

This Article examines the long-standing debate over whether a partnership should be considered an aggregate or entity and then each of the aforementioned subjects in turn. The issue of classification of partners arises among the following contexts: workers' compensation, employment discrimination, qualified deferred compensation plans and welfare benefit plans, and federal income tax of partners and partnerships. This Article suggests that: (a) current court decisions under the Uniform Partnership Act (UPA)[7] on issues of workers' compensation and under Title VII which hold that partners are not employees are probably correct, and (b) this result should be reversed upon enactment of the Revised Uniform Partnership Act (RUPA).[8] The adoption of the entity theory in the RUPA—that a partnership is an entity separate and distinct from its partners—should

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1. BARRON'S GUIDE TO LAW SCHOOLS 71 (10th ed. 1992).
2. 42 U.S.C. § 2000e (1974 & Supp. 1994).
3. *See infra* notes 102-111 and accompanying text.
4. The EEOC has argued this as the "economic realities test," which is presented in terms of a partner's ability to control his employment. *See infra* notes 102-111 and accompanying text.
5. *See* 26 U.S.C. § 401(d) (1988). There is one minor exception; owner-employees are not eligible to receive loans from qualified plans, as such loans are prohibited transactions under ERISA.
6. Pub. L. No. 93-406, 88 Stat. 832.
7. UNIF. PARTNERSHIP ACT §§ 1-45, 6 U.L.A. 1-45 (1969 & Supp. 1994) [hereinafter UPA].
8. UNIF. PARTNERSHIP ACT (1993) §§ 101-1007, 6 U.L.A. 101-1007 (Supp. 1994) [hereinafter RUPA].

provide needed protection for partners. This protection may include treating partners as common law employees for purposes of workers' compensation and Title VII, and probably for welfare benefit plans as well.

I. Entity v. Aggregate: The Debate

A. An Overview

When analyzing the issue of whether a partner should be accorded the status of an employee, it is helpful to determine whether a partnership is considered (i) an aggregate of its individual partners (the "aggregate theory") or (ii) is an entity capable of having a separate existence from its partners (the "entity theory"). The latter theory conceptually allows a partner to be an employee of an entity totally distinct from the individual partners. The United Kingdom provides one example of this theory: The statutes that prohibit sex discrimination and racial discrimination avoid the issue by giving partners the same protection as non-partners, regardless of whether partners are considered employees.[9] The RUPA, which explicitly endorses the entity theory, upsets the conclusions that are based on the aggregate theory of the UPA.

A pivotal issue in drafting the UPA was whether to adopt the entity theory or the aggregate theory. Two of the early drafters, Dean James Barr Ames of Harvard Law School and Dean William Draper Lewis of the University of Pennsylvania Law School had differing positions on the issue.[10]

B. The Initial Debate

According to its primary drafter, Dean Lewis, the UPA ostensibly endorses the aggregate theory.[11] Others expressed the view that, at least by implication, the UPA endorses neither approach but looks at the purpose of a particular section and determines whether the aggregate or entity theory is appropriate.[12] One contemporary supporter of the aggregate theory and the UPA's creation of the concept of tenancy in partnership stated that the UPA is a "live working formula, by which our courts may decide cases in accordance with the circumstances and the reasonable expectations of the parties litigant."[13] However, the courts seem to base their decisions on an all or nothing approach.[14] It is curious, then, that so few

9. Sex Discrimination Act, 1975, ch. 65, §11 (Eng.); Race Relations Act, 1976, ch. 74, §10 (Eng).

10. *See generally* A. Ladru Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 VAND. L. REV. 377 (1963). Dean Ames died during the drafting of the UPA, and Dean Lewis assumed the work of the drafting committee. For responses to the final product, *compare* Judson A. Crane, *The Uniform Partnership Act—A Criticism*, 28 HARV. L. REV. 762 (1915) [hereinafter *Crane I*] *and* William Draper Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 158 (1915) [hereinafter *Lewis I*].

11. William Draper Lewis, *The Uniform Partnership Act*, 24 YALE L. J. 617, 640 (1915) [hereinafter *Lewis II*].

12. *See Crane I*, *supra* note 10, at 773; *see also* Jensen, *supra* note 10, at 379.

13. Joseph H. Drake, *Partnership Entity and Tenancy in Partnership: The Struggle for Definition*, 15 MICH. L. REV. 609, 630 (1917).

14. *See* Jensen, *supra* note 10, at 381.

courts look to any underlying purpose in deciding which approach is appropriate in areas outside those specifically covered by the Act.

Under the leadership of Dean Ames, the first two drafts of the UPA specifically adopted the entity theory. Upon Dean Ames' death in 1910, Dean Lewis replaced him as the primary drafter.[15] Dean Lewis reported:

> When the writer was selected to continue the work of Mr. Ames, it was not long before the difficulties created by the entity theory in other branches of the law of partnership began to appear, and I began to doubt the possibility of drafting a satisfactory act on this theory. It appeared to me that the proper way to settle the controversy was to present to the Committee on Commercial Law two drafts, one drawn on the entity and the other on the common law theory of partnership, and ask the Committee . . . to discuss the drafts and the respective theories underlying them.[16]

According to Dean Lewis, the members of the committee "all joined" in recommending the aggregate theory.[17] Professor Judson Crane of Harvard Law School, Dean Lewis' leading critic, commented that if a believer in the entity theory had presented it, another result might have occurred.[18]

In Dean Lewis' view, a major advantage of the entity theory was that it provided an answer to questions related to the rights of a partner and the separate creditors of a partner in partnership property.[19] Nevertheless, Dean Lewis ultimately departed from the UPA's advocacy of the entity theory.

Dean Lewis' primary justification for abandoning the entity theory was that creditors of the partnership would not be creditors of the individual partners:

> And it is proper to emphasize here that to adopt the legal-person theory itself changes existing law in a matter of vital importance, because [it] is based on an assumption false in fact, namely, that third persons dealing with a partnership do not deal directly with the partners as principals. They do. Partnership creditors are not persons who have trusted primarily a partnership fund of the sufficiency of which the partners are guarantors; they have trusted the partners as individuals with the reputation of possessing property and conducting a successful business.[20]

It is questionable, in an era of legal or accounting partnerships with over one hundred partners, whether creditors are looking to the individual partners as the basis of making their decision to extend credit. However, creditors of a closely held corporation may look to the personal credit of a majority shareholder, and not to the corporation, in lending funds or in selling goods.

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15. *See* Drake, *supra* note 13, at 622.

16. *Lewis II*, *supra* note 11, at 640.

17. *Id.*

18. Judson A. Crane, *The Uniform Partnership Act and Legal Persons*, 29 HARV. L. REV. 838, 850 (1915) [hereinafter *Crane II*].

19. *Lewis I*, *supra* note 10, at 162.

20. *Lewis I*, *supra* note 10, at 166.

Lewis' second objection to the entity theory was that it required some efficient system of registration. It is possible for a partnership to exist even if the principals are unaware that they have in fact created a partnership.[21] Consequently, such principals will be unaware that registration is required. One response to the second objection is that in most states some sort of registration is in effect for assumed names under which the partnership operates,[22] and this system of registration seems to function satisfactorily. Some states require all partnerships to register.[23]

Did the UPA exclusively adopt the aggregate theory, or as Crane suggested, did it implicitly adopt the entity theory to some degree? In order to avoid one of the most unsatisfactory elements of the aggregate theory, the UPA created the concept of tenancy in partnership. Tenancy in partnership provides that each partner has an equal right to possess partnership property for partnership purposes, but no right to possess the property for any other purpose without the consent of his partners.[24] Each partner's interest in the partnership is limited to a share of profits and surplus.[25] None of the existing forms of co-ownership adequately addressed the problems of property owned by a partnership. One infamous English case, *Heydon v. Heydon*,[26] held that the ownership by a partnership was a joint tenancy which allowed the creditor of a separate partner to levy upon partnership property.

Professor Crane saw the concept of the entity theory throughout the UPA in terms of the mere concept of "partnership property"—the ability to own real estate in the partnership name in Section 8(3); the duty to contribute to losses sustained by the partnership, not by his partners (section 18(a)); and the obligation of the partnership, not the partners, to indemnify a partner for certain expenses (section 18(b)).[27] Dean Lewis' reply to these observations and to Professor Crane's criticism followed immediately.[28] Consequently, the debate whether the committee to some degree adopted the entity approach continued.[29]

C. The American Bar Association Recommendations

In 1987, the Business Law Section of the American Bar Association completed an extensive study of the UPA with recommendations for change.[30] The first section in the "Summary of Recommendations," is entitled "Increased emphasis on the entity theory."[31] Implicit in this title is the idea that there was at least some emphasis on the entity theory in the original UPA. Areas where such increased emphasis was recommended include:

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21. *Id.* at 168.
22. 59A AM. JUR. 2d *Partnership* § 64 (1987).
23. *Id.* § 70.
24. UPA § 25.
25. UPA § 26.
26. 91 Eng. Rep. 340 (1693).
27. *Crane I*, *supra* note 10, at 770-71.
28. *See Lewis II*, *supra* note 11.
29. *See* Jensen, *supra* note 10.
30. UPA Subcommittee (Harry J. Haynsworth IV, Chairman) of the Committee on Partnerships and Unincorporated Business Organizations, *Should the Uniform Partnership Act Be Revised*?, 43 BUS. LAW. 121 (1987).
31. *Id.* at 124.

- Limitation of a partner's rights in specific partnership property to the right to use such property in the conduct of the partnership business;
- A requirement that a short form must be filed for foreign general partnerships doing business in the state, the penalty for any such failure is the inability to enforce claims until filing;
- Specific authorization for a partnership agreement to contain a provision that prevents a technical dissolution if the remaining partners agree to buy out the interest of a withdrawing partner;
- Specific authorization for a partnership to sue and be sued in the partnership name;
- Clarification that a partner may be guilty of embezzlement against the partnership; and
- A requirement that any creditor of the partnership must exhaust collection remedies against the partnership before seeking to enforce the judgment against the individual assets of the partners.[32]

The report went so far as to recommend that the entity theory be adopted as a general proposition and that the aggregate theory be retained only to the extent necessary.[33] The emphasis on the entity theory will help any revision of the UPA "focus on resolving the practical problems that have arisen under the existing statute . . . between the entity and the aggregate theories that divided the original drafting committee."[34]

D. The Revised Uniform Partnership Act

The National Conference of Commissioners on Uniform State Law issued the first draft of the RUPA on November 2, 1992,[35] the second draft on October 14, 1993,[36] and the final draft on January 18, 1994.[37] The 1994 draft leaves no doubt as to where it stands on the aggregate versus entity debate: "A partnership is an entity distinct from its partners."[38]

The Comment which accompanies Section 201 does not shed light on the issue of whether or not a partner can be an employee:

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32. *Id.* at 124-25.

33. *Id.* at 153.

34. *Id.* at 184.

35. The Uniform Partnership Act (1993), *supra* note 8, superseded the 1992 version. RUPA Historical Notes.

36. RUPA §§ 101-1006. The 1993 version is reviewed by its drafters and some critics. *See* Donald J. Weidner and John W. Larson, *The Revised Uniform Partnership Act: The Reporter's Overview*, 49 BUS. LAW. 1 (1993).

37. Uniform Partnership Act (1994) (unpublished manuscript, on file with the National Conference of Commissioners on Uniform State Laws, Chicago, Illinois) [hereinafter Manuscript].

38. Manuscript § 201. The words "distinct from its partners" were added in the 1994 draft and are not part of the statutes of Montana and Wyoming, the only two states which as of the date of this publication have adopted RUPA. *See infra* note 45.

> RUPA embraces the entity theory of the partnership. There has been widespread criticism of the aggregate theory. . . . In light of the UPA's ambivalence on the nature of partnerships, an explicit statement is deemed appropriate as an expression of the increased emphasis on the entity theory.
>
> Giving clear expression to the entity nature of a partnership is intended to allay previous concerns stemming from the aggregate theory, such as the necessity of a deed to convey title from the "old" partnership to the "new" partnership every time there is a change of cast among the partners. Under RUPA, there is no "new" partnership just because of membership changes.[39]

The basis upon which one partner may sue the other partners or the partnership is explicitly expanded in the RUPA: "(a) A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership."[40] This section is not designed only to apply to third parties. The Comment ensures that a partner can sue the entity partnership "on a tort or other theory during the term of the partnership, rather than being limited to the remedies of dissolution and an accounting."[41] Section 405 of the 1994 draft is even more explicit: "(b) A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to: . . . (3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship."[42] According to committee comments to the 1993 version, this section allows a partner to "bring a direct suit against the partnership or another partner for almost any cause of action arising out of the conduct of the partnership business" without the necessity of bringing an action for an accounting.[43]

It is curious that the RUPA does not address the issue of whether a partner can be an employee because the issue surfaces in important areas. There is the potential to reverse the current thinking of most courts in the areas of Workers' compensation, Title VII, and the Age Discrimination in Employment Act (ADEA).[44] All existing cases were decided prior to the introduction of the RUPA which, as of the writing of this Article, has been enacted in only two states, although it has been introduced in a few others.[45]

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39. RUPA § 201 cmt. Comments were not changed from the 1993 draft to the 1994 draft and were not reprinted in the 1994 draft.

40. RUPA § 305.

41. RUPA § 305 cmt.

42. Manuscript § 405.

43. RUPA § 405 cmt. 2.

44. 29 U.S.C. §§ 621-34 (1985).

45. MONT. CODE ANN. § 35-10-101 to -644 (1993). WYO. STAT. § 17-21-101 to -1003. Bills are currently pending in Minnesota and Virginia.

II. The Ramifications of the Debate

A. Workers' Compensation

With few exceptions, state workers' compensation statutes do not permit partners who receive only a share of profits to bring workers' compensation claims against the partnership. Several states, by statute, have provided that partners who receive set wages for labor usually performed by employees or for whom workers' compensation premiums have been paid are covered by the act. The majority of cases, however, adhere to the aggregate theory and do not allow a partner to bring workers' compensation action against the partnership.

Hays v. Wyoming[46] is typical among the recent cases. Martin Hays, a partner in Hays Transportation Co., suffered a fatal head injury during the course of his employment. The District Court denied coverage on the ground that he was not an employee within the meaning of the Wyoming's workers' compensation statute. The Wyoming Supreme Court affirmed the District Court and held:

> The plain and unambiguous language of §27-12-102(a)(viii) mandates the conclusion that partners could not receive benefits as "employees" under the Act. The language specifically defined an "employee" as one who had "entered into the employment of or works under contract of services or apprenticeship with an employer." To accept appellant's argument that a partner was an employee under the Act would be to ignore the plain language of §27-12-102(a)(viii) and the legal characteristics of a partner. The language of the statute clearly anticipated that an employer and employee would be *separate legal entities*. Thus, a partner-employer could not be included in the language of the statute as one covered under the Act, as the Act was intended to cover employees only.[47]

One judge concurred solely on the basis that workers' compensation premium payments had not been paid on behalf of the partner. Thus, there was no need to establish an employer/employee relationship. However, the judge indicated that he would certainly be open to reviewing the broader issue presented if a "claimant partner who, having been listed for coverage with premium paid, sustains a job related injury."[48] It will be interesting to see the effect of RUPA in view of the court's reference to "separate legal entities." Wyoming is one of the two states that have adopted RUPA as of the writing of this Article.[49]

Twenty-three other states follow the same general rule as Wyoming, at least where there is no express payment of wages.[50] Only Oklahoma gives partners the unconditional benefit

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46. 768 P.2d 11 (Wyo. 1989).

47. *Id.* at 14 (emphasis added).

48. *Id.* at 17 (Urbigkit, J., concurring).

49. *See supra* note 45.

50. Ford v. Mitcham, 298 So. 2d 34 (Ala. Civ. App. 1974); Brinkley Heavey Hauling Co. v. Youngman, 264 S.W.2d 409 (Ark. 1954); Cooper v. Industrial Accident Comm'n, 171 P. 684 (Cal. 1918); Fink v. Fink, 64 So. 2d 770 (Fla. 1953); United States Fidelity & Guar. Co. v. Neal, 3 S.E.2d 80 (Ga. 1939); Scoggins v. Aetna Casualty & Sur. Co., 229 S.E.2d 683 (Ga. Ct. App. 1976); Metro Constr., Inc. v. Industrial Comm'n, 235 N.E.2d 817 (Ill. 1968); *In re* W. A. Montgomery & Son, 169 N.E. 879 (Ind. Ct. App. 1930); Wallins Creek Lumber Co. v. Blanton, 15 S.W.2d 465 (Ky. 1929); Carpenter v. New Amsterdam Casualty Co., 159 So. 2d 757 (La. Ct. App.

of the workers' compensation statute. In *Ohio Drilling Co. v. State Industrial Commission*,[51] the Oklahoma Supreme Court reached the conclusion that partners could be employees within the meaning of the Oklahoma workers' compensation law. Each of the four partners shared equally in the profits and losses of the partnership and received a draw of $14 per day for living expenses. The court stated:

> We think that the construction of the Workmen's Compensation Act that a member of a partnership, who works for the partnership, and while so engaged is injured, is not an employee within the meaning of the act, is an exceedingly narrow construction of the act . . . and to so hold in the instant case would fail to satisfy the rule announced that the act should be liberally construed so as to effect the legislative intent. We see no good reason why the members of a partnership cannot jointly or severally perform the work or labor incident to the success of the joint undertaking and at the same time draw wages from the earnings of the partnership.[52]

Notwithstanding the reference to "wages," it is clear from a later case[53] that Oklahoma does not require that wages be paid to the injured partner in order for such partner to collect under the Oklahoma Workmen's Compensation Act. However, the distinction between (i) a partner who receives wages instead of, or in addition to, a share of profits and (ii) one who receives only a share of profits is crucial to recovery in a number of states who adhere to the general rule that a partner cannot be an employee within the meaning of workers' compensation statutes.

Without statutory authority specifically holding that a salaried partner is an employee, the payment of wages appears not to help the partner's case. In *Rasmussen v. Trico Feel Mills*,[54] the only working partner in a three person partnership operating a grain elevator received $250 per month. In holding against Rasmussen in his action under the Nebraska workers' compensation statute, the Nebraska Supreme Court used reasoning similar to that used in *Hays*: "The statutory definition speaks of in the service of the employer. . . . But the statutory definition contemplates two persons, the employer and the employee, the master and the servant. It does not contemplate a dual relationship in one."[55] The *Rasmussen* court buttressed its decision in dicta:

1964), *cert. denied,* 161 So. 2d 276 (La. 1964); Black v. Black Bros. Constr. Co., 381 A.2d 648 (Me. 1978); Thurston v. Detroit Asphalt & Paving Co., 198 N.W. 345 (Mich. 1924); Pederson v. Pederson, 39 N.W.2d 893 (Minn. 1949); American Sur. Co. v. Cooper, 76 So.2d 254 (Miss. 1954); Chambers v. Macon Wholesale Grocer Co., 70 S.W.2d 884 (Mo. 1934); Leventhal v. Atlantic Rainbow Painting Co., 172 A.2d 710 (N.J. Super. Ct. App. Div. 1961); Lyle v. H.R. Lyle Cider & Vinegar Co., 153 N.E. 67 (N.Y. 1926); Goldberg v. Industrial Comm'n of Ohio, 3 N.E.2d 364 (Ohio 1936); Herman v. Kandrat Coal Co., 208 A.2d 51 (Pa. Super. Ct. 1965); Tidwell v. Walden, 330 S.W.2d 317 (Tenn. 1959); Superior Ins. Co. v. King, 327 S.W.2d 422 (Tex. 1959); Rockefeller v. Industrial Comm'n of Utah, 197 P. 1038 (Utah 1921); Johnson v. Department of Labor and Industries, 205 P.2d 896 (Wash. 1949). These cases are conveniently summarized in 78 ALR4th 973-1020 (1990).

51. 207 P. 314 (Okla. 1922).
52. *Id.* at 317.
53. Stephens Produce Co. v. Stephens, 332 P.2d 674 (Okla. 1958).
54. 29 N.W.2d 641 (Neb. 1947).
55. *Id.* at 643.

> But observe Rasmussen's own interpretation of his status. He has practically sole control of the business and yet, without knowledge of his partners, did not include a premium for himself in the compensation insurance. He made no payments in social security tax for himself as an employee. His failure to deduct the $250 per month as an expense item in making out income tax returns may have been due to the revenue department's refusal to consider such as deductible, and therefore should carry no weight. But it never occurred to Rasmussen that he was an employee, and his interpretation, agreeing with current thought, should be some index to his status.
>
> Analyzing the work Rasmussen did as a test, no evidence appears, and probably none can be shown, that any of his work and all the time he devoted to the enterprise was not that contemplated by the title of "general manager."[56]

This dicta implies that the court might have reached a different result if Rasmussen had covered himself in the insurance payments. As to the court's reference to the partnership's income tax return, the nondeductibility of the fixed payment has been changed since the adoption of the Internal Revenue Code of 1954.[57] It is now a deductible expense just as if the partnership were dealing with an outsider.[58]

Several states have enacted statutes permitting a partner's claim under workers' compensation where the partner receives wages regardless of profits. Such statutes were upheld by the courts. Consequently, non-equity partners of a two-tier partnership appear to be covered by such statutes. In *Johnson v. Industrial Accident Commission*,[59] the California Supreme Court considered the constitutionality of a statute which provided recovery to a working or salaried partner and held that such statute was constitutional. Similarly, in *Gallie v. Detroit Auto Accessory Co.*,[60] the Michigan Supreme Court held that there was no reason why the Michigan legislature could not redefine "employee" to include a working partner.

B. Employment Discrimination

1. Overview.—Title VII of the Civil Rights Act of 1964,[61] which prohibits discrimination in employment based on race, sex, religion, or national origin, was the first comprehensive national attack on the problem of employment discrimination.[62] Section 703(a) of the Act provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

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56. *Id.*

57. I.R.C. § 707(c) (1988 & West Supp. 1993). Unless otherwise indicated, all references to the Internal Revenue Code are to this version.

58. *See infra* text accompanying notes 140-44.

59. 244 P. 321 (Cal. 1926).

60. 195 N.W. 667 (Mich. 1923).

61. 42 U.S.C. § 2000e (Supp. 1994).

62. MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 24 (2d ed. 1982).

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[63]

The Age Discrimination Employment Act (ADEA)[64] provides similar protection for individuals over age forty and could have a significant impact in the context of professional partnerships such as law or accounting firms. While one does not expect any law firm to fire all employees whose ancestors emigrated from a certain country, one certainly can expect conflict over the issue of mandatory retirement age.[65]

A sharp dichotomy can be seen between court decisions in employment discrimination cases and scholarly commentary. Articles in various law reviews have favored a broad definition of "employee" to bring partners within the protection of the employment discrimination statutes. In contrast, the courts have generally been more restrictive.[66]

However, it should be noted that it is possible to bring partners within the protection of the employment discrimination statutes without ever deciding whether a partner can be considered an employee. The United Kingdom has done precisely that:

> It is unlawful for a firm consisting of six or more partners,[67] in relation to a position as partner in the firm, to discriminate against a woman (a) in the arrangements they make for the purpose of determining who should be offered that position, or (b) in the terms on which they offer her that position, or (c) by refusing or deliberately omitting to offer her that position, or (d) in the case where the woman [is already a partner, it is unlawful to discriminate against her] (i) in the way they afford her access to any benefits, facilities or services . . . or (ii) by expelling her from that position or subjecting her to any other detriment.[68]

Legislative history of this section is elusive, but this situation does not seem to be the result of any case holding that a partner is not an employee. This statute was enacted in 1975, yet until 1989 the courts had not decided whether a partner can be considered an employee.[69]

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63. 42 U.S.C. § 2000e-2 (1974).

64. 29 U.S.C. §§ 621-34 (1985).

65. *See* Rod Doty, *The Age Discrimination in Employment Act and Mandatory Retirement of Law Firm Partners*, 53 S. CAL. L. REV. 1679 (1980).

66. *Compare, e.g.*, Wheeler v. Main Hurdman, 825 F.2d 257, 266 (10th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987) *and* Coleen Eck, *Title VII and the Age Discrimination in Employment Act: Should Partners be Protected as Employees?*, 36 KAN. L. REV. 581 (1988).

67. The words "consisting of six or more partners" were removed by the Sex Discrimination Act of 1986 (Eng.).

68. Sex Discrimination Act, *supra* note 9.

69. Cowell v. Quilter Goodison Co. v. QG Management Services Ltd., Court of Appeal (Civil Division), [1989] IRLR 393. The plaintiff brought suit for unfair dismissal. Such a claim required continuous employment for two years. Plaintiff had been an equity partner of a predecessor partnership which became incorporated less than two years prior to the dismissal. The Court of Appeal held that plaintiff was not an employee prior to incorporation.

Treatises clearly show that the British statute contemplates that this result is an extension of the statute to a relationship other than employer/employee rather than an expansion of the definition of an employee.[70]

2. The United States Supreme Court.—The United States Supreme Court's landmark decision in *Hishon v. King & Spalding*[71] laid the groundwork for cases involving a partnership's discrimination based on gender. Elizabeth Hishon was an associate of King & Spalding, a large law firm in Atlanta, Georgia. After performing as an associate for the requisite amount of time to be considered a partner, she was passed over for partnership, and the firm ultimately asked her to leave. She brought suit alleging that her denial was based on prohibited sex discrimination. The issue before the United States Supreme Court was whether admission to partnership could be a term or condition of employment. The Court held that admission to partner status was a term and condition of employment as an associate and accordingly, that denial of such status could not be based on discriminatory criteria.[72]

Hishon, in her status as an associate attorney, was clearly an employee. Hence, the court did not have to address the issue of whether a partner could ever be an employee. Nevertheless, in his concurring opinion, Justice Powell explained how the case may have been decided had Hishon been a partner:

> I write to make clear my understanding that the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an "employment" relationship to which Title VII would apply. The relationship among law partners differs markedly from that between employer and employee—including that between the partnership and its associates. The judgmental and sensitive decisions that must be made among the partners embrace a wide range of subjects. The essence of the law partnership is the common conduct of a shared enterprise. The relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement . . . or consent among the partners.[73]

In a footnote to the cited text, Justice Powell clarified that "an employer may not evade the strictures of Title VII simply by labeling its employees as 'partners.' Law partnerships usually have many of the characteristics that I describe generally here."[74] A sham labeling cannot defeat the Title VII rights of true employees. What remains unresolved is the degree to which the label of "partner" can be challenged when one with the name of "partner" has at least some characteristics that one normally associates with that term.

3. Lower Courts.—Lower courts show some division on the issue of whether a partner can be an employee, but a slight majority of cases say that they cannot. The Seventh Circuit seems to be close to a per se rule. In *Burke v. Friedman*,[75] the Seventh Circuit faced a

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70. *See* DAVID PANNICK, SEX DISCRIMINATION LAW 64 (1985); *see also* RICHARD W. PAINTER AND KEITH PUTTICK, EMPLOYMENT RIGHTS: A REFERENCE HANDBOOK 120-21 (1993).

71. 467 U.S. 69 (1984).

72. *Id.* at 74.

73. *Id.* at 79-80 (Powell, J., concurring) (footnotes and citations omitted).

74. *Id.* at 79 n.2.

75. 556 F.2d 867 (7th Cir. 1977).

jurisdictional question in a case brought by one who was clearly an employee. The firm had fewer than fifteen common law employees and a number of partners who, when added to the common law employees, brought the total in the firm to over fifteen, the jurisdictional threshold of Title VII.[76] The court made no attempt to analyze whether the status of any partner was a sham perhaps because there was no alleged partner who was the victim of discrimination. The court simply stated that in light of the case law and the Uniform Partnership Act, "we do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business."[77] The Seventh Circuit did not have RUPA before it. One recent article on RUPA appearing in a recent issue of *The Business Lawyer* do not even acknowledge the issue of the application of Title VII to partnerships as an issue that the RUPA should address.[78]

The Seventh Circuit further clarified the classification of partners in *Equal Employment Opportunity Commission v. Dowd & Dowd, Ltd.*[79] Like the *Burke* case, *Dowd* involved a fifteen-employee jurisdictional issue. The difference between the two cases was that Dowd & Dowd was not a partnership but a professional corporation. Applying an economic realities test to the defendant, the court held that the defendant was much like a professional partnership and that the *Burke* principles controlled.[80] In effect, the Seventh Circuit allowed the one who chose the corporate form to assert that substance should control over form. Would the Seventh Circuit have denied shareholders in a C corporation[81] the right to participate in a cafeteria plan on the same basis?[82]

On the narrow issue of who can be deemed an employee in a professional corporation which otherwise has characteristics of a partnership, the Eleventh Circuit agreed with the Seventh Circuit.[83] However, the Second Circuit in *Hyland v. New Haven Radiology Associates*,[84] reached the opposite conclusion. The court held that "an individual's status as major stockholder, officer, or director of a corporation has been found to be compatible with his or her status as employee."[85] *Hyland* was not dealing with a jurisdictional issue but whether one of the four shareholders was entitled to the protection under the ADEA as an employee. The Second Circuit answered in the affirmative. The court did not challenge the proposition that anti-discrimination acts do not generally extend to partners, and based its decision on the form of organization chosen by the defendants.

The United States District Court for the Southern District of New York has on two occasions denied motions to dismiss actions brought by partners, although in one of those

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76. *Id.* at 868-69. It was agreed between plaintiff and defendants that subject matter jurisdiction was dependent on the partners being considered employees for purposes of Title VII.

77. *Id.* at 869.

78. *See* Weidner & Larson, *supra* note 36.

79. 736 F.2d 1177 (7th Cir. 1984).

80. *Id.* at 1178.

81. A C corporation is a corporation which is taxed as a separate entity under I.R.C. § 11. The alternative to a C corporation is an S corporation which is taxed much the same as a partnership under I.R.C. §§ 1361-1379. An S corporation is treated as a partnership for purposes of welfare benefit plans under I.R.C. § 1372.

82. *See infra* text accompanying notes 138-39.

83. Fountain v. Metcalf, Zima & Co., 925 F.2d 1398 (11th Cir. 1991).

84. 794 F.2d 793 (2nd Cir. 1986).

85. *Id.* at 796.

cases, judgment for the defendant was entered on motion for summary judgment. The first case, *Caruso v. Peat, Marwick, Mitchell & Co.*,[86] in the context of one of the "Big Six" accounting firms, held that the plaintiff qualified as an employee[87] notwithstanding the fact that he had been admitted to partnership. *Ehrlich v. Howe*[88] involved a partnership with seven partners.[89] The court, in denying defendant's motion to dismiss, stated that it was unlikely that plaintiff could survive a motion for summary judgment.[90] Summary judgment on this issue was in fact granted sixteen months later.[91] The difference between the size of the two partnerships involved seemed to be an important difference between the two cases rather than any shift in emphasis by the court. The court examined similar factors in both cases.

In *Caruso*, the court was dealing with a firm of approximately 1350 partners of whom approximately 300 were in a management position.[92] In the New York office, where plaintiff had been a partner, there were 128 partners, of whom thirty-six were in a management position.[93] Plaintiff had no control over personnel decisions and was subject to formal annual evaluations of his performance. Plaintiff could make personnel recommendations to the partner in charge of his office, but the weight given to his recommendations changed little before or after his promotion to partner.[94]

The *Caruso* court looked primarily at three factors in holding that the plaintiff was an employee. First, plaintiff did not have the "ability to control and operate" the business, as is characteristic of a partner. Rather, the term partner "is not normally applied to an individual whose employment duties are unilaterally dictated by another member of the business."[95] The second factor was the degree to which plaintiff shared in the profits of the enterprise. The court found that the plaintiff's relatively low number of partnership points meant his salary would change very little with the profits of the firm.[96] The third factor was whether or not plaintiff was considered a permanent employee of the firm to be removed only "in extraordinary circumstances."[97] Here the court found that the plaintiff received annual evaluations in which his job performance was closely scrutinized. If he failed to meet certain standards, the firm could, and subsequently did, ask for his resignation.[98]

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86. 664 F. Supp. 144 (S.D.N.Y. 1987).

87. *Id.* at 150.

88. No. 92 Civ. 1079, 1992 WL 373266 (S.D.N.Y. Dec. 1, 1992).

89. This is stated nowhere in the original decision. The 1992 listing for Martindale-Hubbell lists the firm with seven partners (including Mr. Ehrlich, the plaintiff), one of counsel and one associate. MARTINDALE-HUBBELL LAW DIRECTORY NYC935B-936B (1992).

90. 1992 WL 373266, at *4.

91. Ehrlich v. Howe, 848 F. Supp. 482 (S.D.N.Y. 1994).

92. Caruso v. Peat, Marwick, Mitchell & Co., 664 F. Supp. 144, 145 (S.D.N.Y. 1987).

93. *Id.*

94. *Id.* at 146.

95. *Id.* at 149.

96. *Id.* at 150.

97. *Id.* at 149.

98. *Id.* at 150.

In *Ehrlich v. Howe*,[99] the plaintiff, a former partner in a law firm, alleged that the defendants had terminated his status with the firm to avoid his vesting in a non-qualified plan that was covered by ERISA. In order to come within ERISA, the plan had to cover at least one employee. Therefore, establishing his status as an employee was crucial to plaintiff's claim. Plaintiff based his claim of employee status on the fact that he did not share in decision-making and had to accept their partnership agreement on a take-it-or-leave-it basis.[100] Defendant responded that the plaintiff not only alleged he was a partner several times in his complaint, but also shared proportionally in the firm's profits. Consequently, the *Ehrlich* court suggested strongly that Plaintiff could not establish that he was an employee.[101]

Caruso and *Ehrlich* can be reconciled because of the vast differences in the size of the partnerships and other characteristics which accompany differences in size. *Caruso* cannot, however, be reconciled with the Tenth Circuit's decision in *Wheeler v. Main Hurdman*.[102] Like Peat, Marwick, Mitchell & Co. in *Caruso*, Main Hurdman is one of the nation's "Big Six" accounting firms. Approximately 500 of the 3570 personnel were partners.[103] The court noted the following partnership characteristics:

> Partnership consisted at least of the following: election to the partnership and execution of the Firm's partnership agreement; change in compensation from salary to a share of the Firm's profits, paid by draw and an allocation of profits based on points; a contribution to capital; establishment of a capital account; unlimited personal liability for the debts and obligations of the partnership; rights under the partnership agreement to vote on such matters as amendments of the partnership agreement, approval of mergers with other accounting firms of a certain size, admission of new partners, termination of a partner's interest, approval of draws, shares of net profits, special distributions, and any other income to be allocated to any partners and dissolution of the firm. In addition, Wheeler became eligible for certain rights and privileges which were enjoyed only by partners of the firm, such as the right to sign audit reports and tax returns and the right to be reimbursed for membership dues in certain clubs; and, she was subject to involuntary termination [by certain votes of the entire partnership or various governing bodies].[104]

The facts in *Wheeler* quoted above are similar to the facts in *Caruso,* but offer more detail. In addition, it was adduced that Wheeler's duties remained unchanged after elevation to partner and that she was supervised in her work and assignments by the same department head.[105] Other characteristics she shared with Caruso were: a personnel file was maintained on her, the amounts charged for her services were set by managing partners, her partnership points for sharing income were set by her managing partner, the decision of her managing partner to terminate her was, as a practical matter, the final word.[106]

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99. No. 92 Civ. 1079, 1992 WL 373266 (S.D.N.Y. Dec. 1, 1992).
100. *Id.* at *3.
101. *Id.*
102. 825 F.2d 257 (10th Cir. 1987), *cert. denied,* 484 U.S. 986 (1987).
103. *Id.* at 260.
104. *Id.* at 260-61 (footnotes omitted).
105. *Id.* at 261.
106. *Id.*

In its opinion, the Tenth Circuit starts by agreeing with the plaintiff and the EEOC that absolutes in this area are difficult to sustain.[107] The court did not, however, agree with the plaintiff on her argument that whether or not she was an employee depended on an "economic realities" test. First, most of the cases cited by the plaintiff and the EEOC to distinguish a "true" partner from an "employee" partner were cases where the issue was whether a party was an employee or an independent contractor. The court found those cases useless in determining whether a general partner could be considered an employee.[108] Second, the court found that the theory espoused by the EEOC could cover almost all partners nationwide:

> The heart of the standard proposed to us is a theory that any individual who is organizationally or economically dominated is an employee. In applying the domination theory to partnerships, there is an underlying assumption by its proponents that a "true" general partnership operates like a New England town meeting; that "true" general partners are not employees because they personally control management of the business and their own affairs within the business; that "true" general partners are not "dominated;" they are not controlled; they enjoy equality of bargaining power. . . .
>
> With due respect, those arguments and assumptions are not likely to translate to the real world with any discernible limits. . . . Indeed, large partnerships may operate more democratically overall than small partnerships, which are frequently vulnerable to domination by a single partner or a small group of partners. "Domination" of a partner in assignment and supervision of work, billing, share of profits, and other matters can result from a myriad of wholly practical reasons existing from time to time in any partnership. . . . When the EEOC asserts that status depends upon the "individual's ability *actually to control* factors such as the management of the firm and critical elements of his or her work". . . we must wonder just how many partners the "actual control" requirement describes in the real world, and if *any* partnership of any duration would not have employee partners. What the EEOC and Wheeler are describing as true partners are sole proprietors and a limited number of dominant partners nationwide.[109]

After reviewing certain issues it considered as practical problems, such as the possibility of a partner drifting in and out of employee status or having employee status depend on how autocratic the managing partner was in a given regional office, the court noted the principal weakness of the plaintiff's case:

> The central problem with the approach by Wheeler and the EEOC, however, is that it either ignores or relegates to insignificance the economic reality of partnership status itself. We view that as a fatal flaw. Status as a general partner carries important economic reality as well. Employees do not assume the risks of loss and liabilities of their employers; partners do. It is no small thing to be exposed to unlimited liability, to be personally at risk for a partner's mistakes, and

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107. *Id.* at 268.

108. *Id.* at 271-72.

109. *Id.* at 273.

> to have one's share of profits always potentially conditional upon the outcome of claims, suits, and obligations generated by another partner. . . . Even if the partnership is viewed as an entity separate from its partners for some purposes, it cannot shield the partners from risk, including liabilities arising from suits by other partners. There is simply no equivalent to unlimited liability in *any* case dealing with the definition of employee, nor is there any equivalent in any understood definition of the term.[110]

The penultimate sentence of the last quotation answers one very important question *vis-à-vis* RUPA. Making the partnership an entity does not by itself change the ultimate result reached by the Tenth Circuit. The court also quickly disposed of the plaintiff's argument for broad coverage in view of the remedial goals of the legislation. Plaintiff's argument would make the act of discrimination *ipso facto* proof of employee status. If Congress had wanted to cover all services rather than merely those performed by an employee, it could have done so.[111] There is no indication that Congress considered the issue. Thus, the Tenth Circuit's argument simply employs a default categorization in the absence of Congressional intent.

Notwithstanding the Court's statement that absolutes are difficult to sustain, the Tenth Circuit makes a compelling argument for an all-or-nothing standard with such observations as the plaintiff's argument knows no "discernible limits" or that her argument would cause some partners to drift in and out of employee status. The court's observation, however, that the plaintiff's argument would make discrimination *ipso facto* proof of employee status is a good argument for giving all partners the protection of the law. Discrimination in the work place is what Title VII and ADEA seek to avoid, and one who suffers such discrimination almost by definition has insufficient power to avoid being fired or subject to other detriment from which the partner cannot escape by quitting without serious loss of revenue. The Tenth Circuit has made the argument for, and RUPA gives the statutory authority for, partner coverage.

The United States District Court for the Southern District of Ohio, in *Simpson v. Ernst and Young*,[112] denied a motion for summary judgment, holding that a "partner" of Ernst & Young, another "Big Six" accounting firm, was in fact an employee for purposes of ADEA.[113] The District Court purported to cite all the factors listed by the Tenth Circuit in *Wheeler*, but shows some very strong prejudices of its own. In setting out the issues as stated by the parties to the litigation, the court stated:

> Ernst & Young asserts that neither Simpson nor any other Party discharged during 1990 and 1991 is entitled to the protection afforded by the employment discrimination laws because these individuals are not employees, but partners. The inescapable logic of this position is that Ernst & Young claims to be free to discriminate against hundreds of its accountants due to age, race, sex, religion, national origin, and handicap because it asserts they are not employees.[114]

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110. *Id.* at 274.

111. *Id.* at 275.

112. 850 F. Supp. 648 (S.D. Ohio 1994).

113. *Id.* at 665.

114. *Id.* at 654.

The court's discussion of the various factors supports its decision, that Simpson did not share in profits, had no access to firm books and records, and did not have a vote on the makeup of the management committee. However, in purporting to follow *Wheeler* as well as other cases such as *Caruso*, the court skirts over the issue of unlimited liability by not only ignoring the statement in *Wheeler* that the existence of unlimited liability was a fatal flaw in Wheeler's case, but also in suggesting without authority that Simpson's agreement to unlimited liability might be unenforceable as unsupported by consideration.[115] The court does not explain why Simpson's salary is insufficient consideration.

C. *ERISA and Keogh Plans*

Pension plans and welfare benefit plans must be for the exclusive benefit of employees.[116] Thus, the issue of whether a partner is an employee turns on the partner's participation in such plans. For support of either position on this issue, there is much contradictory language in ERISA and predecessor language in the Internal Revenue Code (the "Code"). In particular, one can find authority in the Self-Employed Individuals Tax Retirement Act of 1962,[117] which created qualified plans for the self-employed. These plans are commonly referred to as "Keogh plans" after Eugene J. Keogh, the author of the legislation who introduced it at various times over a period in excess of ten years, or "H.R. 10 plans," for the bill number of an earlier version of the bill.[118]

The greatest support for the concept of a partner being a common law employee comes from the Code's definition of the term "owner-employee." The Code made clear that a self-employed individual was an employee.[119] The Code makes a distinction between owner-employees and other employees that puts some partners in the category of other employees.[120]

The term "owner-employee" now stands almost naked in the Code without significant application.[121] At the time of the enactment of ERISA, there were significant restrictions on

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115. *Id.* at 663.

116. I.R.C. § 401(a).

117. Pub. L. No. 87-792, 76 Stat. 809 (1962) (codified in scattered sections of 26 U.S.C.).

118. EMPLOYEE BENEFIT RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 113 (4th ed. 1990).

119. The pertinent part of I.R.C. § 401(c)(1)(A) provides:

(c) Definitions and rules relating to self-employed individuals and owner-employees.

For purposes of this section—

(1) Self-employed individual treated as employee:

(A) In general. The term "employee" includes, for any taxable year, an individual who is a self-employed individual for such taxable year.

120. I.R.C. § 401(c)(3) provides:

(3) Owner-employee.

The term "owner-employee" means an employee who—

(A) owns the entire interest in an unincorporated trade or business, or

(B) in the case of a partnership, is a partner who owns more than 10 percent of either the capital interest or the profits interest in such partnership.

To the extent provided in regulations prescribed by the Secretary, such term also means an individual who has been an owner-employee within the meaning of the preceding sentence.

121. *See* I.R.C. § 401(d). This section provides in effect that two or more businesses controlled by such

the degree to which a plan could benefit an "owner-employee."[122] When the Tax Equity and Fiscal Responsibility Act of 1982[123] established parity between plans for the self-employed and other plans, it also established "top-heavy" rules,[124] which limited benefits for highly compensated employees and therefore eliminated the necessity of many of the rules that had applied to "owner-employees."[125]

What is significant is that only partners with an ownership interest of more than ten percent are "Bad Guys," people who cannot receive the benefit of discriminatory practices. Partners with less than a ten percent interest are classified the same as other employees for at least some purposes, while some restrictions apply to all self-employed persons.[126] Further, "a partnership shall be treated as the employer of its partners who are self-employed individuals."[127]

In hearings on the Self-Employed Individuals Tax Retirement Act of 1962, Senator Long stated directly that one can be both employer and employee at the same time:

> When a person is both the employer and the employee, it is fair to say that half of the income which could be attributable to the employer should not be taxed at that time, because every retirement program that we set up for our own employees and every retirement program that we vote for the general public maintains that principle.[128]

Senator Long attempted to analogize the proposed act to the treatment of partners under Social Security where, at that time, self-employed individuals were not covered by Social Security.[129] However, one must also allow for the possibility that, as an oral statement, the choice of words may not have been made with the same precision that might have been made with a written statement. Prepared statements by witnesses indicated the viewpoint that becoming a partner of a professional partnership meant forfeiting employee status in terms of rights to pension contributions and that fairness dictates that this result be reversed.[130]

With regard to non-pension benefits covered by ERISA, regulations issued by the Department of Labor unequivocally state that a partner is not an employee: "A partner in a

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partner must be aggregated, and only a partner's earnings from self-employment of the trade or business of the plan can be used to determine the owner's share of contributions to the plan. *Id.*

122. I.R.C. § 401(d) (West Supp. 1961).

123. Pub. L. No. 97-248, 96 Stat. 324 (1982).

124. I.R.C. § 416 (1988 & West Supp. 1993).

125. EMPLOYEE BENEFIT RESEARCH INSTITUTE, *supra* note 118, at 114.

126. H.R. REP. NO. 378, 87th Cong., 1st Sess. 6 (1961).

127. *Id.* at 20. Language of identical import is found at S. REP. NO. 992, 87th Cong., 1st Sess. 31 (1961), *reprinted in* 1962 U.S.C.C.A.N. 2964.

128. *Self-Employed Individuals' Retirement Act: Hearings on H.R.10 Before the Senate Finance Comm.*, 87th Cong., 1st Sess. 20, 44 (1961) (statement of Honorable Stanley S. Surrey, Assistant Secretary of the Treasury).

129. *Id.*

130. *Self-Employed Individuals' Retirement Act of 1959: Hearings on H.R. 10 Before the Comm. on Finance*, 86th Cong., 1st Sess. 296-98 (1959) (statement of J. Milton Edelstein, chair of the Legislative Committee of the Association of Advanced Underwriters); *Id.* at 325-333 (statement of Richmond Corbett on behalf of the Chicago Bar Association).

partnership and his or her spouse shall not be deemed to be employees with respect to the partnership."[131]

The Department of Labor, in its notice of proposed rule making,[132] said that this issue was one of protection:

> In ordinary usage and under common law, the term "employee" is generally not considered to include a partner. In addition, in a plan or program covering only partners, the protection which Title I was designed to provide is unnecessary, because partners are generally capable of protecting their own interests under existing law.[133]

In order to give this protection, Title I of ERISA[134] imposes on employers certain disclosure requirements, such as summary plan descriptions,[135] which must be given to employees. A question of cost is also relevant here:

> The definition of the term"employee" in section 3(6) . . . could be read as broadly as section 401(c) (1) [*i.e.*, to include partners as employees] of the Code, which sweeps almost any working individual under the term "employee" for purposes of section 401, regardless of common law or other established concepts of the employment relationship. In view of the policies set forth in section 2 of the Act, however, the basic thrust of the protection which Congress provided in Title I is not directed toward so wide a class of individuals. In situations where Title I protection are unnecessary—where the abuses which Congress sought to prevent are unlikely to occur—enforcement of Title I would not only impose unnecessary costs on benefit plans, but also divert resources of the Department of Labor from administering Title I in situations where genuine abuses existed or could arise.[136]

Shareholder employees are covered because the corporate relationships are more complex:

> In many instances an executive of a smaller or medium-sized corporation who is also shareholder of the corporation occupies a position with respect to an employee benefit plan maintained by the corporation similar to the position occupied by a partner with respect to a plan maintained by a partnership. No provision for plans covering only such corporate executive-shareholders has been included in proposed §2510.3-6. In view of the greater complexity of corporate relationships, and in view of the fact that virtually every individual who is an employee of a publicly traded corporation may readily acquire a few shares of the corporation, a blanket exclusion of corporate shareholders from the term "employee" would obviously be inappropriate.[137]

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131. 29 C.F.R. § 2510.3-3(c)(2) (1993).
132. 40 Fed. Reg. 24642 (1975) (proposed June 9, 1975).
133. *Id.* at 24643.
134. 29 U.S.C. §§ 1021-1168 (1988 & Supp. 1993).
135. 29 U.S.C. §1021(a) (Supp. 1993).
136. 40 Fed. Reg. 24642, 24643 (1975) (proposed June 9, 1975).
137. *Id.* at 24643-44.

There was no attempt here to distinguish between a shareholder with a ten percent or more interest in a corporation (which can happen even in a publicly traded corporation) and a General Motors employee who owns 100 shares of General Motors stock, even though the Internal Revenue Code made such a distinction with partnerships.

D. Cafeteria Plans

With regard to Cafeteria Plans under Code Section 125, proposed regulations make clear that a partner is not an employee.[138] The statute itself merely says that in a Cafeteria Plan, all participants must be employees.[139] The Committee Report of the Joint Committee gives no guidance on how this should apply to partners.

Because a partner does not need the disclosure protection that ERISA makes available to rank and file employees, the partner suffers a substantive disadvantage by being unable to participate in welfare benefits plans such as a Cafeteria Plan. This disadvantage simply does not follow from the premise of not needing disclosure protection. If the Treasury and the Department of Labor wish to have a consistent public policy, the exclusion of partners as employees is curious. Excluding partners should have nothing to do with a lack of any need of disclosure because this restriction affects basic eligibility.

E. Partners as Employees Under Partnership Income Tax Provisions of the Internal Revenue Code of 1954

When the Internal Revenue Code was overhauled in 1954, the legislative comments made it clear that, with regard to partnership income tax provisions,[140] the new Code was adopting an entity theory of partnership in viewing transactions between a partner and the partnership with a few exceptions to stop abuses:[141]

> When a partner sells property to, or performs services for the partnership, the problem arises whether the transaction is to be treated in the same manner as though the partner were an outsider dealing with the partnership (the "entity" approach). An alternative ("aggregate" approach) is to view the partner as dealing with himself to the extent of his own interest and as dealing with the partnership with respect to the balance of the transaction. The present code fails to cover the problem and judicial decisions on the subject go in both directions. Because of its simplicity of operation, the "entity" rule has been adopted by the House and your committee.[142]

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138. *See* 49 Fed. Reg. 19321-19329 (proposed May 7, 1984).

139. I.R.C. § 125(d)(1)(A).

140. I.R.C. §§ 701-761.

141. The two exceptions both involve sale of assets from a partner to a partnership. If a partner owns directly or indirectly more than a fifty percent interest in the partnership, no loss will be allowed on the sale. I.R.C. § 707(b)(1) (1988). If a partner owns directly or indirectly more than an eighty percent interest in the partnership, any gain which will be ordinary income in the hands of the transferee shall be ordinary income to the partner. I.R.C. § 707(b)(2) (1988). *See also* J. Rex Dibble, *Partnership Changes in General,* 1955 So. Calif. Tax Inst. 177, 187-188.

142. S. Rep. No. 1622, 83rd Cong., 2d Sess. 92 (1954).

The aggregate approach proved unworkable for a partnership in a year in which the partnership profits were insufficient to cover the partnership salary expense. Treasury regulations under the Internal Revenue Code of 1939 were clear that a salary was merely an adjustment of the distributive incomes among the partners.[143] This was satisfactory if there were sufficient profits to cover the salary, but not if profits were insufficient:

> Let us consider the *C* and *D* partnership. Each partner invests $10,000 and is to share equally in profits and losses after an annual salary of $3,000 is paid to *C*. In its first year the partnership loses $2,000, and in addition pays *C* his salary. The result is that *C* has made $500 while *D* has lost $2,500. It is somewhat anomalous to speak of *C*'s income as a distributive share of partnership income, when the partnership return shows a loss. And it can be easily be imagined that a revenue agent would be dubious about the allowance of a $2,500 partnership loss to *D*, when the entire partnership loss appears on its return as $2,000.[144]

The result was the enactment of Code Section 707(c) which states that if the partnership pays a partner for services, and if such payments are not dependent on the income of the partnership, the payments are treated as having been made to an outsider. In the example above, *C* would be treated as having received a $3,000 salary, the partnership would report a loss of $5,000 and both *C* and *D* would report losses of $2,500.

CONCLUSION

The treatment of partners under various areas of the law is uncoordinated and inconsistent. Courts are loathe to upset long-standing precedent without clear statutory authority. Some of the developments in the welfare benefits area have been anomalous, primarily excluding partners from participation when the stated reason for not including them as employees is that they have no need for procedural protection provided by ERISA. One solution to the erratic treatment of partners is the enactment of legislation that would override the inconsistent positions taken by courts and various administrative agencies. Because the relationship among partners and the definition of partnership is generally a matter of state law,[145] RUPA is the most logical, effective cure for the current inconsistencies in the law. If the adoption of the entity theory in RUPA is not sufficient to establish that partners are employees of the partnership, then RUPA should be amended to explicitly state that partners are employees.

In addition to those changes in state partnership law, federal legislation is desirable to cure the inconsistencies in the treatment of a partner's welfare benefits if the Department of Labor does not respect the changes of RUPA. If courts do not respect the changes of RUPA, then legislation treating partners as employees is desirable for Title VII. This legislation should define the circumstances under which a partner is considered an employee or otherwise receives the protection of various laws. This legislation should clarify the current

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143. Treas. Reg. § 19.183-1(2) (as amended in 1940).

144. Jacob Rabkin & Narklt Johnson, *The Partnership Under the Federal Tax Laws*, 55 HARV. L. REV. 909, 921 (1942).

145. The Internal Revenue Code contains its own definition of a partnership for income tax purposes. *See* Treas. Reg. § 3-1/88-1-2 (as amended in 1977).

law, which has evolved from court decisions attempting to discern what Congress would have thought about a matter that Congress in fact did not consider.

What is the disadvantage of giving partners blanket protection? The Tenth Circuit in *Wheeler*, in considering the application of Title VII to partners, decided that the unlimited liability of partners so distinguished them from common law employees that Congress could not have intended to cover partners.[146] However, is a partner in any different position than three shareholders in a closely held business who own all of the corporation's stock and who are compelled to guaranty all loans from banks or credit from vendors? Under appropriate conditions, the shareholders of such a corporation can be treated as partners in a partnership for purposes of reporting their income under the Internal Revenue Code.[147] Yet if these shareholders are employed by the corporation, they are clearly covered by Title VII.[148]

The countervailing argument, at least for partners who receive remuneration based primarily or solely on the profits of the partnership, is that such partner's interest is an ownership interest and that, with the exception of Subchapter K of the Internal Revenue Code, legislation discussed in this Article is not directed at owners. Such owners financially resemble shareholders. The exclusion of a partner from the definition of an employee is well established and RUPA does not explicitly change the definition of employee. Only a very specific statute, such as the one in the United Kingdom, would change the result.

RUPA's adoption of the entity theory should have a significant impact. However, as the decisions discussed in this Article illustrate, judicial interpretation of RUPA may not be uniform. Treating the partnership as an entity separate and distinct from its partners does not explicitly answer the question whether a working partner is always an employee. If courts do not find that RUPA affects a change in the status of partners, the current confusion will remain. The English statutes demonstrate a possible solution to the current ambiguity in the law. The objective of providing clarity and consistent treatment under workers' compensation, Title VII, pension and welfare benefits, and partnership provisions of the Internal Revenue Code is obtainable. Legislation should be enacted that unequivocally answers in the affirmative the question whether or not a partner is an employee. This legislation will eliminate the problems of varying decisions by courts and administrative agencies.

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146. Wheeler v. Main Hurdman, 825 F.2d 257 (10th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987).

147. I.R.C. §§ 1361-79 (1988 & West Supp. 1993).

148. Equal Employment Opportunity Comm'n v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984), provides an exception. *See supra* text accompanying notes 79-82.

An Organizational Approach to Resolving the Attachment and Perfection Problems of Identity Changes under § 9-203(1)(a) & § 9-402(7) of the Uniform Commercial Code

Gregory J. Morical*

"Look to the essence of a thing, whether it be a point of doctrine, of practice, or of interpretation."[1]

Introduction

The purpose of the Uniform Commercial Code (U.C.C. or "Code") is to provide clear and concise answers to practical commercial questions. In some circumstances, however, courts have interpreted and applied the Code in a way that blurs its intended effect. This Article will focus on one such distortion. This distortion is a result of the judicial attempt to resolve the effect that a postperfection change in corporate form, or "identity change," has upon an otherwise valid security interest in after-acquired property.

An identity change occurs when a debtor (the "original debtor") changes its corporate form, transfers assets subject to a security interest to the postchange entity (the "new debtor"), and continues business as the new debtor. A change of form can occur in various ways. For example, an entity can change from a proprietorship or partnership to a corporation, a subsidiary may be created, or a merger may result. A transfer of assets pursuant to an identity change is different from a transfer of assets to a third party because an identity change involves a transferor and transferee that are similar, if not substantively identical.

Changes in corporate form occur constantly within the national economy. An entity has creditors and clients before the change and continues to operate as an economic unit, regardless of form, after the change. Unfortunately, the problem of how to treat the effect of a change in form on a prechange security interest in after-acquired property has not been satisfactorily resolved. The Permanent Editorial Board of the Uniform Commercial Code has recognized this problem and is considering revising Article 9 to make the intended effect of the applicable sections more clear.[2] However, the special committee set up to review Article 9 (the "Study Committee") itself is split on which of the two prevailing approaches to adopt: the identity approach or the Burke approach.[3] Regardless, the Committee has been unable to articulate a statutorily valid means of implementing the identity approach.

This Article fills the gap in the Committee's analysis by proposing a statutorily valid means of implementing the identity approach through use of the term "organization." For

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1. Marcus Aurelius Antoninus, A.D. 121-180 (translated by Morris Hickey Morgan [1859-1910]).

2. *See* PEB Study Group, Uniform Commercial Code Article 9 Report 140-51 (December 1, 1992); *id.* at 141 ("Accordingly, the Committee thinks that Article 9 should distinguish between name changes, in which the original debtor continues as the same legal entity, and other changes, in which the original debtor does not so continue.").

3. *Id.* at 144-45.

purposes of simplification, this statutory interpretation will be referred to as the organizational approach or organizational interpretation. Though the organizational approach relies on many of the policy justifications of the identity approach, it reaches the same result in a more practical and certain manner.

The organizational approach uses language already present in the Uniform Commercial Code to provide a means by which to implement the identity approach, while at the same time avoiding the current problems of that approach. Specifically, this approach uses the definition of "organization" as the means to differentiate between transactions involving identity changes where the transferor and the transferee are related entities, from those transactions involving unrelated third parties. The goal of this Article is twofold. First, this Article will demonstrate why the result reached by the identity approach is the preferred result, and how the traditional problems with that approach may be avoided with the proposed interpretation. Second, in case the Committee does not revise Article 9 to reflect this interpretation, this Article provides an analysis by which courts that agree with the policies underlying the identity approach may use the language of the current U.C.C. to legitimately reach an appropriate result.

The first Part of the Article provides the context for considering the issue by setting forth the essential aspects of a secured transaction and the practical policies which underlie Article 9 of the Uniform Commercial Code. Part II traces the development of the response to the issue within the Code and judicial opinion. This Part specifically addresses the foundations and problems of the two different approaches courts have taken to resolve the issue. Part III considers the effect of the two approaches upon the various commercial constituents and concludes that the identity approach is vastly superior, though problematic as currently applied. Part IV provides a means to overcome the problems of the identity approach through use of the term "organization." This Part sets forth the means by which the approach should be judicially applied. Finally, Part V proposes a set of official comments that would legislatively adopt the organizational approach, whether by the Committee or individual state legislatures.

I. Background

The secured transaction plays an important role in modern commercial and consumer relationships.[4] Secured transactions provide creditors, who deal with debtors who are otherwise unable to access credit resources, with a mechanism to inject value into individual and organizational endeavors.[5] A secured creditor has a significant power over debtors because of the ability to seize a debtor's property upon nonpayment. As a result, the Code generally requires the secured transaction to be memorialized in writing.[6] A potential

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4. *See* Robert M. Lloyd, Secured Transactions 1-18 (1988).

5. The collateral of a secured transaction allows the secured creditor to finance an individual or business which is a larger credit risk by minimizing the risk of nonpayment. If a default results, the creditor has a claim against the debtor for the amount owed, against the collateral to satisfy the deficiency, or both. The subsequent decrease in the creditor's risk may be passed on to the debtor in the form of a more favorable interest rate or payment plan. F. Stephen Knippenberg, *Debtor Name Changes and Collateral Transfers Under 9-402(7): Drafting from the Outside-In*, 52 Mo. L. Rev. 57 (1987).

6. This requirement "is in the nature of a Statute of Frauds." U.C.C. § 9-203 Official Cmt. 5 (1994).

problem arises when the secured transaction leaves the debtor in possession of the collateral. The debtor's possession of the collateral has the potential to mislead other creditors into believing that the property is unencumbered.[7] Creditors operating under that mistaken belief may lend on the collateral.[8] The U.C.C. provides a solution to this problem of "ostensible ownership" by requiring the original secured party to file a financing statement declaring and detailing the security interest in the debtor's collateral, a description of the collateral, and the amount of the security.[9] This system of "notice filing"[10] provides an incentive to prospective secured parties to search for applicable financing statements: debt secured by collateral already securing another debt is inferior in terms of satisfaction to the previous debt.[11] If prospective secured parties do not investigate prior to providing value, then they bear the risk of receiving an inferior security interest. Essential to fair application of the notice filing system is the ability of diligent, prospective secured parties to locate filings relevant to the debtor, and thereby act knowledgeably if lending on collateral securing a superior security interest.

The particular method of secured lending at the center of this Article is lending upon after-acquired property.[12] Due to their nature, many businesses have a constant turnover in a significant amount of potential collateral. The clearest examples of this type of business

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It fulfills an evidentiary function by establishing the terms of an agreement, thereby decreasing the likelihood of a future dispute. A written agreement is not necessary where the secured party maintains possession of the collateral. Possession by the secured party provides an equally effective means to ensure that both parties agree on and understand the particular collateral subject to the security interest. *Id.* The terms of the security agreement can have a significant impact in that they bind not only the parties, but other creditors of the debtor and purchasers of the collateral. U.C.C. § 9-201.

7. This is known as the problem of "ostensible ownership." LLOYD, *supra* note 4, at 5.

8. When the subsequent secured party lends and takes an interest in the collateral, no problem will occur if the collateral is of sufficient value to cover both liabilities in the case of a default. If that is not the case, then the problem of how to divide the proceeds of the collateral among the conflicting secured parties arises. On one hand, the original secured party should be favored, because it provided the value initially. On the other hand, how could the second secured party have known that the collateral was secured by an earlier agreement?

9. U.C.C. § 9-402(7). Where such a filing is not made, the collateral is open for other secured parties who filed before the original filing or to judgment debtors seeking to satisfy their judgments. Where a filing is properly made, the security interest of later secured parties is subject to that of the original secured party—the original secured party has "priority." U.C.C. § 9-312. A secured party may also perfect a security interest by possessing the collateral. U.C.C. § 9-203.

10. U.C.C. § 9-402 Official Cmt. 2.

11. U.C.C. §§ 9-301(1)(a), 9-312(5).

12. Article 9 provides a mechanism that allows secured parties to lend on types of collateral which would be ineffectively secured under a traditional secured transaction. This type of lending generally involves inventory or accounts receivable financing, or may include any type of collateral held by a debtor for a short period of time, being subsequently replaced by other items. *See* LLOYD, *supra* note 4, at 208-09 (for example, new shoes in the inventory of a shoe store). The Code provides an effective means of securing these types of collateral through the use of an after-acquired property clause to subject property acquired by a debtor after the execution of a security agreement to the security interest. U.C.C. § 9-204. The secured party may continue to advance funds with the expectation that, if necessary, the debtor will have the collateral necessary to satisfy whatever obligation remains outstanding.

include manufacturers and sellers of consumer goods, such as a shoe store or an electronics wholesaler. The assets of such entities are primarily inventory and accounts receivable. However, both inventory and accounts receivable undergo constant turnover, making lending documentation with respect to single pieces of collateral impossible. Instead, the U.C.C. established section 9-204, which allows the secured party to take a security interest in a *type* of collateral, for instance accounts receivable and inventory, that a debtor currently has or will acquire in the future. The debtor benefits by being able to acquire credit based upon a significant amount of its assets and the secured party benefits by a constant flow of present collateral from which it may, if necessary, satisfy the debt.

After the security interest is attached and perfected, debtors are capable of undergoing many types of changes which may frustrate the secured relationship and the notice system for prospective secured parties. Postperfection changes can be categorized as external or internal. External changes involve changes in the debtor's environment that affect the validity of the security interest or financing statement. They include changes in: the debtor's residence, place of business, location and/or use of collateral,[13] and the location of the debtor.[14] Generally, external changes are resolved by the Code with a strong degree of certainty.

One example of such a change is a debtor name change, which may adversely impact the ability of a prospective secured party searching the filing system to learn of a prechange security interest, thus bringing into question the effectiveness of the prechange financing statement.[15] Internal changes involve a change in the debtor itself which affects the validity of the security interest or financing statement.

One type of internal, postperfection change that the Code does not clearly address is an "identity change." As set forth above, an identity change occurs when a debtor changes legal form, transfers all or part of its assets to the successor entity, and continues business as the new entity. Only through a change in corporate form can a debtor accomplish an identity change, because the corporate form is the only legal mechanism that creates a different legal entity.[16] Regardless of whether the debtor is a proprietorship, partnership, or existing corporation, it can form a new corporation and transfer all or part of the assets and business operations of the original entity to the successor. A change in form may also result from a merger or occur as a result of a business transfer between a parent corporation and its subsidiary. Scenarios that involve an identity change are potentially very factually complex.

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13. U.C.C. § 9-401(3).

14. U.C.C. § 9-103.

15. The Code provides answers to how most types of internal changes affect the validity of an underlying security interest and the effectiveness of a financing statement. In the case of a name change that renders the financing statement "seriously misleading" to a reasonable searcher, the secured party is given four months in which to file a new amended financing statement or the perfected status of the security interest lapses. U.C.C. § 9-402(7); § 9-402 Official Cmt. 7. In the case of a transfer of the collateral from one debtor to an unrelated entity, the security interest and its perfected status continue in the collateral unless the secured party authorized the sale. U.C.C. § 9-306(2). The effect of the name change rule is to place a general duty of research on prospective secured parties regarding the collateral: "any person searching the condition of the ownership of a debtor must make inquiry as to the debtor's source of title, and must search in the name of a former owner if circumstances seem to require it." U.C.C. § 9-402 Official Cmt. 8.

16. *See* United States v. Fidelity Capital Corp., 920 F.2d 827 (11th Cir. 1991).

However, at the core of each scenario is the use of corporate form to create distance between the prechange and postchange debtor.

Theoretically, an identity change creates two issues regarding the validity of application of a prechange security interest in after-acquired property to the postchange debtor. First, the postchange entity has a different legal identity than the prechange entity. This calls into question the enforceability of the security agreement signed by the prechange entity against the postchange entity with respect to collateral acquired after the change that otherwise would have been subject to the original security interest in after-acquired property. Second, the change may have the effect of hampering prospective secured parties from determining the existence of a prechange security interest. The identity change may have been accompanied by other internal and external changes, the most common of which seems to be a name change. The combined impact of the identity and accompanying changes may hinder the effectiveness of the prechange financing statement in fulfilling the goals of notice filing. As discussed below, the evolution of the statutory and judicial responses to identity changes has only recently confronted these two issues effectively. However, the approach that courts have used can be changed to achieve better results.

II. A Change of Form and Article 9

The problem of internal postperfection changes affecting an after-acquired security interest did not arise under pre-Code law.[17] The courts first confronted the issue under the 1962 version of Article 9, which provided little guidance.[18] Those courts divided postperfection changes into two categories: name changes and transfers.[19] In the case of a name change, refiling or amendment of the financing statement was not necessary to continue the perfected security interest absent knowledge of the impending change by the secured party prior to filing.[20] When a change of form occurred with a subsequent transfer of collateral and business to the successor entity whose name was similar, courts often held that the change should be treated as a name change, at least indirectly conceptualizing the pre and postchange debtors as the same entity.[21] Most courts did not distinguish between collateral

17. State of New York, Report of the Law Revision Commission for 1955, Study of the Uniform Commercial Code 281 (1955).

18. Ray D. Henson, Handbook on Secured Transactions Under the Uniform Commercial Code § 4-6 at 67 (2d ed. 1979).

19. *See generally* Knippenberg, *supra* note 5.

20. *In re* Kalamazoo Steel Process, Inc., 503 F.2d 1218 (6th Cir. 1974). *In re* The Grape Arbor, Inc., 6 U.C.C. Rep. Serv. (Callaghan) 632 (Bankr. E.D. Pa. 1969) (postfiling change of name from The Philadelphia Eating Society did not invalidate financing statement); Continental Oil Co. v. Citizens Trust & Savings Bank, 244 N.W.2d 243, 244-45 (Mich. 1976); *see also* William B. Davenport & Daniel R. Murray, Secured Transactions 166 (1978).

21. Davenport & Murray, *supra* note 20, at 166. *See also* Ryan v. Rolland, 434 F.2d 353, 357 (10th Cir. 1970) (secured party is not required to refile as to present or after-acquired property after debtor transfers to successor corporation); Avdoyan v. Sun Bank at Pine Hills, N.A. *(In re* Sofa Center, Inc.*)* 18 U.C.C. Rep. Serv. (Callaghan) 536, 539 (M.D. Fla. 1975).

acquired before and after the change, nor did they consider the effect of a change in form on the validity of the security agreement and security interest.[22]

A. The Effect of the 1972 Revision: § 9-402(7)

Part of the 1972 revision of Article 9 was aimed at resolving the effect a postperfection, internal change in the debtor has upon a prechange security interest.[23] Section 9-402(7) of the revised Code expressly addresses the problem. Two sentences of that section bear upon this discussion:[24]

> Where the debtor so changes his name or in the case of an organization its name, identity or corporate structure that a filed financing statement becomes seriously misleading, the filing is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless a new appropriate financing statement is filed before the expiration of that time.[25] A filed financing statement remains effective with respect to collateral transferred by the debtor even though the secured party knows of or consents to the transfer.[26]

The drafters did not clearly indicate which portion of section 9-402(7) they intended to govern a change in form.[27] The language of the Official Comment is somewhat ambiguous: "Subsection (7) also deals with the case of a change of name of a debtor and provides some guidelines when mergers or other changes of corporate structure of the debtor occur with the result that a filed financing statement might become seriously misleading."[28]

B. The Identity Approach

Shortly after section 9-402(7) was codified, the majority of courts confronted with identity changes began to rely on the language of the new statute while still applying the prerevision reasoning.[29] Changes of corporate form were given the name, "identity changes

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22. *See In re* A-1 Imperial Moving & Storage Co, 350 F. Supp. 1188, 1189 (S.D. Fla. 1972).

23. Subsection 7 of U.C.C. § 9-402 was added "[t]o solve [the] dilemma of whether to require the filing of an amendment upon a significant change of identity of the debtor." American City Bank v. Western Auto Supply, 631 S.W.2d 410, 418-19 (Tenn. Ct. App. 1981). "The decisions [under the 1962 Act] do not, however, supply a satisfactory rule for practice; their rationale is frequently narrow." DAVENPORT & MURRAY, *supra* note 20, at 166.

24. The first version, which stands virtually unchanged today, was proposed in Preliminary Draft 2, February 1970.

25. Hereinafter referred to as the "second sentence."

26. Hereinafter referred to as the "third sentence."

27. *See* Review Committee of Article 9 of the U.C.C., Final Report 246 (1971) (discusses change of name and "new" debtors).

28. U.C.C. § 9-402(7) Official Cmt. 5. The intent of the section is to govern only the effectiveness of the filing. "Obviously, the subsection does not undertake to state whether the old security agreement continues to operate between the secured party and the party surviving the corporate change of the debtor." U.C.C. § 9-402 Official Cmt. 7. *See* PEB Study Group, *supra* note 2, at 143 ("Some courts have failed to recognize that § 9-402(7) addresses only the question of the effectiveness of a filed financing statement and not the question of whether a security interest attaches to particular property."). Therefore, application of this section necessarily assumes the validity of an underlying security interest.

29. *See, e.g.*, Corwin v. RCA Corp., 516 F.2d 24 (6th Cir. 1975) (applying Ohio law, which had yet to

or intrafamily transfers."[30] Courts applying this approach classified internal postperfection changes of a debtor into three categories: name changes, identity changes or intrafamily transfers, and transfers to an unrelated party.

The identity approach interprets the language of the *second sentence* of section 9-402(7) as governing more than a simple name change;[31] it also governs changes in the debtor's corporate form or "identity."[32] When only the form of the entity changes, the postchange debtor is not treated as a distinct and separate entity from the prechange debtor for purposes of Article 9.[33] Under the identity approach, the *third sentence* is interpreted as applying only

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adopt the revised U.C.C. § 9-402(7). However, the court made mention of the revised section in its analysis). *Corwin* involved the creation and subsequent transfer collateral to a new corporate entity, Kittyhawk Television Corp., by the original corporation, Kittyhawk Broadcasting Corp. The security agreement granted the secured party a security interest in present collateral; the agreement did not contain an after-acquired property clause. Following the transfer, the secured party failed to execute either a new security agreement or a financing statement showing the name of the new corporation. The debtor subsequently filed for bankruptcy. The trustee sought to avoid the security interest by arguing that the security interest did not survive the transfer. The court disagreed. In its reasoning, the court disregarded the separate and distinct status of the corporations to hold that a name change had taken place.

See also Houchen v. First Nat'l Bank of Pana, 445 F. Supp. 665 (S.D. Ill. 1977). *Houchen* involved a bank loan to individual debtors for the purpose of starting a business. The bank took a security interest in the fixtures, equipment, inventory and after-acquired property of the business. After receiving the loan, the debtors transferred all of the business assets to a corporation, Taylorville Eisner Agency, Inc., which they had previously formed. Thereafter, the corporation assumed the debt of the individual debtors and ran the business.

When the debtor filed voluntary bankruptcy two years later, none of the merchandise and inventory held for sale was present at the time of the transfer of assets to the corporation. The corporate debtor had not signed a new security agreement, nor had the bank filed a new or amended financing statement. The bankruptcy court held that a failure to file an amended financing statement made the bank unsecured as to collateral acquired by the debtor more than four months after the transfer. The district court reversed. It read the definition of collateral in the *third sentence* to mean all collateral subject to the security interest. The financing statement "remain[ed] effective with respect to collateral transferred, which included any property to be acquired by the corporation which would fall under the after-acquired property clause." *Id.* at 669.

30. Claude Michael Stern, Note, *Debtors' Name or Identity Changes: Distributing Benefits and Burdens Under Article 9*, 31 HASTINGS L.J. 959, 983 (1980).

31. "The court was probably correct in concluding that the transaction fell within the second sentence of 9-402(7) as a 'change in corporate structure.' There was only one debtor, not a sale of collateral to an independent third party." BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE S2-29 (2d ed. Supp. No. 2 1992) (referring to Bank of the West v. Commercial Credit Fin. Servs., Inc., 852 F.2d 1162 (9th Cir. 1988)).

32. Barkley Clark, a noted commentator on the U.C.C., agrees:

> The better construction of § 9-402(7) is that incorporation of proprietorships should be treated in the same way as name changes and mergers. This approach is consistent with the definition of "organization" in § 1-201(28). The incorporation of a proprietorship easily fits within the phrase "changes in name, identity or corporate structure." More important, there is no good policy justification for treating these transaction under the third sentence of § 9-402(7).

Id. at 2-116.

33. The separate status of the entity should be respected for matters outside of the secured transaction (*i.e.*,

to transfers of "unrelated" parties.[34] Where a debtor undergoes a change in form with a subsequent transfer of collateral to the successor entity, the identity approach treats the two entities as so related that the *third sentence* does not apply. Rather, the effectiveness of the financing statement is controlled by the *second sentence.*[35]

The Ninth Circuit in *Bank of the West v. Commercial Credit Financial Services*[36] applied the identity approach to resolve the effect of a transfer of assets by a parent corporation from one subsidiary to another. Bank of the West provided four million dollars of financing to Allied, a wholly owned subsidiary of Boles World Trade Corp (BWTC), secured by present and after-acquired inventory, accounts and proceeds of Allied. Two years after the Allied financing, Commercial Credit entered into account factoring financing with respect to a beverage wholesaling business operated by Boles & Co., Inc. (BCI), another wholly owned subsidiary of BWTC. Shortly thereafter, BWTC transferred the beverage business from BCI to Allied. Bank of the West asserted that it had priority over Commercial Credit for the accounts generated by the beverage business after its transfer from BCI to Allied. The court held that the transfer was a "change in corporate structure of the debtor."[37] Therefore, the Continental financing statement continued to be effective as to collateral acquired by Allied for a minimum of four months. The court reached this conclusion by interpreting the term "debtor" in the second sentence "to mean not only the transferor, but also to include the transferee."[38]

The identity approach is supported by practical and sound policy. The approach is oriented toward practicality. When only a change in corporate form has occurred, the prechange debtor's clients and creditors perceive the pre and postchange entities as the same organization. As a result, the change in form cannot practically be said to have created a completely different entity. Furthermore, the identity approach frustrates attempts of debtors to make unsecure an otherwise valid security interest in after-acquired property by changing corporate form. The Ninth Circuit recognized this policy in *In re West Coast Food Sales, Inc.*[39] In *In Re West Coast*, the court refused to allow "a debtor . . . to evade the obligations of a validly executed security agreement by the simple expedient of an alteration in its business structure."[40]

As currently advocated and applied, the identity approach has two problems that render it ineffective in resolving the effect of a change in form on a prechange security interest in after-acquired property: (1) it fails to provide a reliable and generally applicable means for parties and courts to determine whether an identity change or a third party transfer has

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the extent of a shareholder's liability on a corporate debt). *See infra* note 44 and accompanying text.

34. *Bank of the West,* 852 F.2d at 1169.

35. "Under the facts of this case and in order to effectuate the purposes of the Uniform Commercial Code, we think it is proper to disregard the form of the transaction and instead to focus upon its substance." Corwin v. RCA Corp., 516 F.2d 24, 27 (6th Cir. 1975) (transfer of substantially all of corporation's assets to newly formed corporation). *See supra* note 29.

36. 852 F.2d 1162 (1988).

37. *Id.* at 1169.

38. *Id.* at 1170.

39. 637 F.2d 707 (9th Cir. 1981).

40. *Id.* at 709.

occurred; and (2) it fails to address the issue of whether a prechange security interest may be properly asserted against the postchange debtor.

Courts that have applied the identity approach have failed to set forth a consistent set of factors on which to base future determinations of whether a transaction is an identity change or a transfer to an unrelated party. Furthermore, the application of the factors that have been enunciated has been haphazard. Courts have used a variety of factors and a fact-centered analysis, incapable of general application, to determine that particular transactions result in identity changes.

Two factors that several courts have considered are the ownership and control of the prechange and postchange debtors. Those factors were the focus of the court's reasoning in *In re Meyer-Midway*,[41] where the court found that the transaction constituted an identity change. The case involved the merger of two separate corporations, Meyer and Midway, into a newly formed corporation, Meyer-Midway, Inc. The court held the original financing statement sufficient to overcome the bankruptcy trustee's challenge to the after-acquired security interest in accounts receivable generated within four months after the merger.[42] In *Corwin v. RCA Corp.*,[43] the Sixth Circuit focused on the ownership and control of the original and successor entities.[44] That court placed emphasis on the fact that the original and successor entities occupied the same location in making its determination that the transfer of assets should be governed by the second sentence.[45]

The court in *In re Cohutta Mills*[46] focused on ownership and control, as well as other factors, to determine that a prechange and postchange debtor were "related" parties. The original debtor, King's Tuft, Inc., procured a loan from a local bank that was secured by a note on the debtor's equipment, machinery, and after-acquired property. The bank filed a proper financing statement, perfecting the security interest. Two years after the filing, the debtor formed a new corporation, Cohutta Mills, Inc., and transferred King's Tuft's assets to that corporation. The court noted that the two corporations had the same president, the successor corporation followed in the same line of business as King's Tuft, at the same location, using the same machinery and equipment. As a result, the court stated that "[r]ather than merely a transfer of assets between two corporations, King's Tuft essentially became Cohutta Mills as a result of the transaction."[47] Although courts have considered various factors, they have failed to provide a coherent rule or test for applying their approach.

A second problem of the "identity" approach is the assumption that a prechange security interest may be asserted against a postchange entity. The courts applying the identity

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41. 65 B.R. 437 (Bankr. N.D. Ill. 1986). *But see In re* Paramount Int'l v. First Midwest Bank, 154 B.R. 712 (Bankr. N.D. Ill. 1993) (The court declined to follow *Meyer-Midway*, but the issue of the case was whether the use of the debtor's trade name on the financing statement was sufficient to perfect a security interest in the collateral.).

42. In dicta, the court recognized that a new filing would be required by the end of the four month period because the name of the successor entity rendered the financing statement seriously misleading. *Meyer-Midway*, 65 B.R. at 443.

43. 516 F.2d 24 (6th Cir. 1975).

44. *Id.* at 26.

45. *Id.* at 24.

46. 108 B.R. 815 (Bankr. N.D. Ga. 1989).

47. *Id.* at 820.

approach have not confronted this issue. However, as critics of the identity approach recognize, an issue exists as to whether the original security agreement is effective to create a security interest in collateral acquired by the postchange entity after the transfer. On its face, section 9-402(7) governs only the effectiveness of a financing statement; it does not control the validity of the underlying security interest.[48] The validity of a security interest is governed by section 9-203(1), which requires that:

> (a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers crops growing or to be grown or timber to be cut, a description of the land concerned.[49]

The result of a change in form is the transfer of the security obligation from one entity to a different legal entity. Because the two entities are legally distinct, the signature of the original debtor would seem insufficient to qualify as the "signature" of the postchange debtor for purposes of section 9-203(1)(a).[50] Therefore, the prechange security agreement would not extend to cover collateral acquired after the change of form. Because the secured party would not have a security interest in the collateral, the identity language of section 9-402(7) in itself would be insufficient to subject that collateral to the prechange security interest.

C. The Burke Approach

In response to the above two problems, the critics of the identity approach developed a new approach.[51] It is authored by William Burke, Chairman of the Article 9 Study Committee and is based upon a strict, albeit narrow, interpretation of the relevant language of the Code. It attempts to provide a bright-line test for determining the effect of a postperfection change in form on a prechange security interest.

The Burke approach argues that section 9-402(7) governs two types of postperfection changes. The first category includes simple name changes and mergers, which leave the original debtor as the successor entity. The narrowness of the approach is based on a

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48. "[T]he language of § 9-402(7) cannot properly be construed to dispense with the specific requirements of § 9-203(1)." Bank of Yellville v. Scott, 113 B.R. 516, 522 (Bankr. W.D. Ark. 1990); *see also*, U.C.C. § 9-402 Official Cmt. 7, discussed in *supra* note 15.

49. U.C.C. § 9-203(1)(a). The two other requirements for a valid security interest are not affected by a change in form. They are that "value" has been given and that the debtor has rights in the collateral. U.C.C. § 9-203(1)(b), (c).

50. If this construction of "the debtor" is correct, the assumption that the security interest may be asserted against a successor entity is invalid. That construction also would make invalid the reasoning of courts that applied successors and assigns clauses to validate the security interest. Again, U.C.C. § 9-203 requires that "the debtor" sign the security agreement. In the case of a "successors and assigns" clause, the successor debtor has not "signed" the "security agreement." Even though such a clause may be sufficient to enforce a general agreement against the successor entity, it would be insufficient to meet the signature requirement for establishing a valid security interest under the statute.

51. William M. Burke, *The Duty to Refile Under Section 9-402(7) of the Revised Article 9*, 35 BUS. LAW. 1083 (1985). "However, [the identity approach] is a weak foundation upon which to build a refiling doctrine since it offers no neutral principles upon which one can determine when a transfer will be honored and when it will be disregarded." *Id.* at 1092.

perception that the two references to "the debtor" in the second sentence "make it clear that the section applies only to change of name category cases."[52] In these situations, the *second sentence* of section 9-402(7) governs and provides that the financing statement remains effective to perfect collateral acquired within four months[53] after the change and will continue to do so unless the change makes the financing statement seriously misleading.[54] The second category of changes, resolved under the *third sentence* of section 9-402(7), includes all transfers of collateral: those from a debtor to a third party, as well as when a debtor changes corporate form and transfers the collateral from an original to a successor entity.[55]

The court in *Bank of Yellville v. Scott*[56] applied the Burke approach to two individuals who borrowed $185,000 from a local bank to purchase an audio/video business and subsequently incorporated. Prior to incorporation, they executed a security agreement granting the bank a security interest in all present and after-acquired property of the business.[57] The bank filed a financing statement listing the individuals, as well as the business, KC Audio Video Center of Camden, as the debtors. During the following month, the individuals formed a corporation and transferred all assets of the business to that corporation, KC of Camden, Inc., in return for all but one share of the corporation's stock. Shortly thereafter, the corporation entered into an agreement with Borg-Warner to finance the corporation's purchase of additional inventory.[58] The bank did not become aware of the debtor's incorporation until the following year. The bank did not take steps to execute a new security agreement, nor did it file a new or amended financing statement.[59] Borg-Warner asserted that it had priority to the inventory it helped finance,[60] even though its financing statement postdated the one filed by the bank and covered the same type of collateral. The court used the Burke approach to find for Borg-Warner. It held that the original secured party did not have a security interest in collateral acquired by the debtor after the incorporation.[61]

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52. *Id.* at 1095; *see also* ELDON H. REILEY, GUIDEBOOK TO SECURITY INTERESTS IN PERSONAL PROPERTY § 3.07 (1994) ("While this sentence refers to changes other than name changes, it is not clear that it has any meaningful application to any change other than a simple name change.").

53. This period will be the shorter of four months or the effective time remaining on the financing statement. U.C.C. § 9-402, Official Cmt. 7.

54. The timeframe is the effective period of the financing statement. *Id.*

55. This is the position advocated by the Sixth Circuit. Bluegrass Ford-Mercury, Inc. v. Farmers Nat'l Bank of Cynthiana, 942 F.2d 381 (6th Cir. 1991). The debtor sold a car dealership to a third party, who retained a similar corporate name and remained at the same location. The court held that the transaction was governed by the *third sentence*. The court placed emphasis on the "unrelated" ownership in reaching that result. *Id.* at 388.

56. 113 B.R. 516, (Bankr. W.D. Ark. 1990).

57. *Id.* at 518.

58. These items included stereo equipment and other property capable of being identified by serial number. *Id.*

59. *Id.* at 518-19.

60. The arrangement was such that Borg-Warner could not assert a purchase money security interest override. *See* U.C.C. § 9-312(4).

61. Two factually similar bankruptcy cases reached the same result. *See* Northeastern Bank of Penn. v. Spirit of the West, Inc. (*In re* Spirit of the West, Inc.), 164 B.R. 34 (Bankr. M.D. Pa. 1993); *In re* Just for Kids, Inc., 150 B.R. 123 (Bankr. M.D. Pa. 1992).

III. Comparing the Two Approaches

Prior to considering whether revitalization of the identity approach is possible through use of the term organization, it must first be determined whether the identity approach outcome warrants the effort.

One way of examining the relative merits of the two approaches is to consider the practical effects of the different approaches on the participants involved in secured transactions. This seems to be the most appropriate mechanism to test the effectiveness and policy implications of the available approaches. After all, the Code is meant to provide practical guidance. Manifestly, therefore, it would seem that the most practical approach should be preferred. Five different parties feel the impact of either approach, and therefore deserve consideration. These parties are: the original secured party, the prospective secured party, unsecured and lien creditors of the successor entity, and the debtor.

A. The Original Secured Party

A change of form "is fraught with risks"[62] and causes monitoring problems for the original secured party. Practically speaking, a debtor can alter its form without significant difficulty.[63] A transfer of assets from the original to the successor entity may be accomplished by a minimal exchange of paper. The transferee may retain the debtor's location, line of business, ownership, and name. Even a diligent secured party, policing the debtor as to changes that may impair his security interest, would unlikely be able to discern that a change of form has occurred.[64] Regardless of the secured party's expectations or the security agreement, the approach taken by a court in resolving the situation will dictate whether the secured party has a security interest in collateral acquired by the debtor after the change in form.

The Burke approach provides that when a debtor changes its form the prechange security interest will not extend to any collateral acquired after the change.[65] The burden on a secured party is acutely felt, especially in cases of inventory or accounts receivable

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62. Davenport & Murray, *supra* note 20, at 167.

63. For example, the incorporation of a proprietorship or partnership may only require the filing of a Certificate of Incorporation in the proper government office.

64. A presently secured party could be required to monitor the secretary of state's office for recent incorporations and mergers. Under either approach the secured party will monitor those filings, for as discussed *infra* in note 108 and accompanying text, only a narrowly qualified transaction should be treated as an identity change. Qualified transactions include cases with characteristics that make it difficult for a secured party to learn of a change that threatens his security interest. In situations not covered, the secured party will encounter characteristics that should put him on notice to check other sources of information to determine whether a change has occurred that would threaten his security interest. At that point, he would monitor the recent filings in the secretary of state's office. A requirement that the secured party constantly monitor those filings makes the balance of his duties onerous and is devoid of policy justification. *See* Clark, *supra* note 31, at 2-111.

65. The Ninth Circuit expressed strong antipathy to that result: "To hold otherwise would permit debtors to decide which sentence of section 9-402(7) applies merely by choosing an advantageous formal arrangement for the desired transaction." Bank of the West v. Commercial Credit Fin. Servs., 852 F.2d 1162, 1171 (1988).

financing, where present collateral[66] will be unavailable to satisfy the debtor's obligation. Without that collateral, the likelihood that the obligation will be fully secured decreases,[67] which frustrates the fundamental purpose of the secured transaction—to provide security for credit extended.[68] Part of the Study Committee recognized the problems involved with placing such a strict monitoring burden on presently secured parties: "[the Burke approach] would unduly prejudice secured parties whose debtors engage in corporate or similar restructurings without their knowledge or consent. . . . [E]ven a diligent secured party may be unaware that individual debtors have incorporated their business into a new debtor . . ."[69] The secured party could add a clause to the security agreement requiring the debtor to inform the secured party of an impending change of form, but such contractual rights have little value when most needed—bankruptcy.[70] The holder of mere contract rights stands as an unsecured creditor.[71] Therefore, the holder takes last from what is almost always an insufficient pool of assets.[72]

The "identity" approach, on the other hand, provides diligent prechange secured parties a reasonable period of time in which to discover and resolve the potentially threatening situation. Where the debtor in the course of the change in form also changes its name, so that the financing statement becomes seriously misleading, the original secured party has four months in which to file a new financing statement.[73] In that case, the Code expressly allows a secured party to refile under the name of the postchange entity, without requiring the consent of the debtor.[74] Where the name remains the same or the change does not render the financing statement seriously misleading, the collateral remains perfected until the end of the effectiveness of the financing statement.[75]

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66. Present collateral is transferred by the original to the successor entity and is protected under the *third sentence*. As discussed earlier, particular items of those types of collateral are generally held by the debtor for a limited time before they are sold and replaced with other similar items. *See* U.C.C. § 9-204.

67. Although a proceeds claim under § 9-306 is available, the tracing requirements make it difficult to use.

68. The secured transaction provides the secured party the stability to make advances. Allowing the debtor to cut off the security interest undermines this stability. *See supra* notes 5-11 and accompanying text.

69. PEB Study Group, *supra* note 2, at 144.

70. "It is often said that the acid test of a security interest is in the debtor's bankruptcy." HENSON, *supra* note 18, at 258. The trustee in bankruptcy may successfully avoid (*i.e.*, render the transaction unsecured) where the security interest is unperfected. 11 U.S.C. § 545 (1988). In bankruptcy, any prepetition contract claim the secured party may have against the debtor is treated as an unsecured obligation. Unsecured obligations receive pro rata satisfaction, to the extent of their claim, from the remains of the debtor's estate after administrative expenses and priority claims are satisfied. 11 U.S.C. §§ 507(a), 726(a), (b) (1988).

71. 11 U.S.C. § 502 (1988).

72. 11 U.S.C. § 726 (1988).

73. Four months is a more reasonable period of time in which to expect a present secured party to monitor its debtor closely enough to discover a change of form accompanied by a name change. Regardless of theoretical reasonableness, the drafters of the Code established four months as a reasonable time for prospective and current secured parties to become aware of changes of name and form. *See infra* note 82 and accompanying text.

74. The secured party may refile a financing statement without the debtor's consent in the case of a change in name, identity, or corporate structure. *See* U.C.C. § 9-402(6).

75. Such a result properly recognizes the difficulty a secured party would have in determining such a change during his monitoring.

B. The Prospective Secured Parties

Extending the current secured party's security interest a minimum of four months after the identity change does not unduly burden prospective secured parties. By providing a four month "safe"[76] period for present secured parties following a simple name change, the Code has already "allocated the burden of discovering" changes in the debtor "to later lenders."[77] Furthermore, prospective secured parties already have a clear duty to inquire into the prior ownership of collateral[78] and as a result, they are "better situated to reduce or eliminate the risk of loss—*e.g.*, by inquiring into the new debtor's corporate history and the source of its property."[79]

Requiring prospective secured parties to search the recent[80] corporate history of a debtor would not be inconsistent with the already existing burden.[81] It is implicitly included in the prospective secured party's current duty to inquire into the background of the debtor four months prior to a contemplated transaction.[82] In addition, the duty of inquiry is not limited to the filing system, and therefore may include state incorporation records. The court in *In re Pasco Sales Co.*[83] recognized that a prospective secured party should not rely on the filing system as the sole source of information, but should instead treat it as "a starting point for investigation which will result in fair warning concerning the transaction contemplated."[84] Placing the burden of searching state incorporation records on the prospective secured party is also consistent with section 9-401(3),[85] which generally places the burden of changes that the present secured party cannot control upon the prospective secured party.[86] Finally, courts

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76. Any collateral acquired within that period is subject to the financing statement, regardless of whether the change makes the previous filing seriously misleading. U.C.C. § 9-402 Official Cmt. 7.

77. Bank of the West v. Commercial Credit Fin. Servs., 852 F.2d 1162, 1173 (9th Cir. 1988).

78. "[A]ny person searching the condition of the ownership of a debtor must make inquiry as to the debtor's source of title, and must search in the name of a former owner if circumstances seem to require it." U.C.C. § 9-402 Official Cmt. 8; *see also* Peter F. Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 526 (1973).

79. PEB Study Group, *supra* note 2, at 145.

80. "Recent" includes the four months prior to the anticipated transaction. If the change occurred prior to that period and an amended financing statement has not been filed, the subsequent secured party would gain priority over the unperfected previous security interest. REILEY, *supra* note 52, at 3.07[3].

81. Some courts disagree: "To require a searcher to determine to what extent a debtor entity is owned or controlled by owners of the transferor debtor would render the filing system of Article 9 unreliable. The potential structural variations of the new debtor are infinite." Bank of Yellville v. Scott, 113 B.R. 516, 522-23 (Bankr. W.D. Ark. 1990).

82. This duty flows from the *second sentence*, which implicitly requires prospective secured parties to search under prior names of the debtor.

83. 354 N.Y.S.2d 402 (1974), *rev'd on other grounds*, 52 N.Y.S.2d 42 (1976).

84. *Id.* at 405 (quoting Beneficial Fin. Co. of N.Y. v. Kurland Cadillac-Oldsmobile, Inc., 32 A.2d 643, 645 (1969)).

85. "A filing which is made in the proper place in this state continues effective even though the debtor's residence or place of business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed." U.C.C. § 9-401(3).

86. "[I]t was not intended . . . that interested parties be completely absolved from any inquiry as to the past history of the debtor." *In re* Pasco Sales Co., 354 N.Y.S.2d 402, 405 (1974).

that have considered the effect of a change of form on potential and present secured parties are more comfortable in placing the burden of searching recent corporate history on prospective secured parties:

> We decline to adopt the position advocated by the trustee . . . that a creditor *must* file a new financing statement whenever a debtor changes from a proprietorship or partnership to a corporation. . . . Section 9-402(7) requires a new statement only when the change renders the existing financial statement "seriously misleading". . . . Since . . . we find that a creditor doing a lien search would have been on actual notice of . . . [the] security interest and the identity of the debtor despite the bank's failure to completely observe the "corporate technicalities," it would be inappropriate to hold that a change in the entity . . . is seriously misleading as a matter of law. . . . A flat rule that a new financing statement must be filed whenever a debtor incorporates might be easier to apply, but that standard is not supported by a plain reading of the statute or the existing law in the jurisdiction.[87]

C. The Unsecured Creditors

The rights of unsecured creditors are also affected by the approach applied.[88] Unsecured creditors are interested in the validity of a security interest to the extent that collateral subject to an invalid security interest is available to satisfy their claims in bankruptcy.[89] When the Burke approach is applied, unsecured creditors benefit from the generally larger amount of assets available. When the identity approach is applied, the number of available estate assets decreases as the assets are made subject to the original, prechange security interest.[90]

Allowing unsecured creditors access to collateral acquired after the change is illegitimate. The original secured party injected value into the debtor based upon the assumption that the after-acquired collateral would provide security for the debt. The unsecured creditor would unfairly take advantage of that value and the expectation of the secured party, undermined by an action of the debtor, where that value would not have been present had the expectation of the secured party been upheld or the secured transaction not been executed. Application of the identity approach deprives unsecured creditors of this windfall and favors the secured party who provided the debtor with the means to acquire the collateral or operate the enterprise. The unsecured creditors who would take advantage of the after-acquired collateral are not treated unfairly when their access is denied.

D. The Lien Creditors

The treatment of lien or judgement creditors[91] is similar to that of unsecured creditors; when the identity approach is applied they will have access to less collateral in bankruptcy than under the Burke approach. The justification of denying unsecured creditors a windfall in bankruptcy applies with equal weight to lien creditors.

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87. *In re* Darling Lumber, Inc. 56 B.R. 669, 674 (Bankr. E.D. Mich. 1986).

88. Knippenburg, *supra* note 5, at 65.

89. An invalid security interest increases the pro rata proportion of satisfaction the unsecured creditors would receive in a Chapter 7 bankruptcy proceeding. *See* 11 U.S.C. §§ 544(a), 558 (1988).

90. Knippenburg, *supra* note 5, at 65.

91. Lien or judgment creditors are entities that have received a state court judgment. U.C.C. § 9-301(3).

Lien creditors do have an advantage over unsecured creditors under the identity approach; outside of bankruptcy, lien creditors have priority over unperfected security interests.[92] Under the identity approach, the secured party has four months in which to refile or amend a financing statement made seriously misleading by the change of form. Failure to refile or amend results in the security interest becoming unperfected as to collateral acquired four months after the change. The lien creditor can satisfy its judgment with unperfected collateral, whereas an unsecured party takes subject to the security interest, regardless of whether it is perfected.[93]

E. The Debtor

A debtor subject to a valid security interest in its after-acquired property has only one interest in which approach is applied to its change of form. The debtor wants to avoid the security interest. However, the original security interest was the result of a bargain between the debtor and the secured party, and the debtor should be bound by that agreement.

If the Burke approach is applied, the debtor's collateral will no longer be subject to the original, bargained-for security interest. Instead, the debtor will be free to induce a new secured party to provide credit by offering that party the primary security interest in the collateral. The effect of the Burke approach is to provide the debtor with a windfall. The amount of credit provided to the debtor by the original secured party was determined, at least in part, by the amount of collateral that would secure the debt. If less collateral were available at the time of lending, only the credit capable of being secured with that collateral would likely have been extended. Under the Burke approach, the debtor removes the bargained for collateral from the original credit relationship while still retaining the original amount of credit. Furthermore, that collateral may be used to induce other secured parties to extend credit. In that sense, the debtor can "have its cake and eat it too."

Therefore, the Burke approach provides a debtor with the incentive to undergo a change of form any time it wishes to increase available credit. This incentive is detrimental to the original secured party. The problems inherent in this incentive provide significant policy support for the identity approach.

The identity approach precludes a debtor from acting unilaterally to sever a prechange security interest in after-acquired collateral. Instead, the debtor is held to the original bargain. Under the identity approach, the debtor is no worse off than it would be under its bargained-for position. The debtor is not permitted to obtain double the credit for the same collateral.

The results reached by the identity approach, in contrast to those of the Burke approach, are manifestly supported by policy, as well as by actual commercial practice and expectation. A debtor that changes its form should not be able to cut off a previously valid security interest in after-acquired property.

Only secured parties who are diligent in their efforts to police debtors may take advantage of the identity approach. Failure to file an amended financing statement within four months after a change in form that caused the financing statement to become seriously misleading causes the security interest to become unperfected. At that point, any prospective secured party that lends on collateral will have a superior interest in the after-acquired

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92. U.C.C. § 9-301(1)(b).

93. *Id. See also* HENRY J. BAILEY III, SECURED TRANSACTIONS 233-34 (3d. ed. 1933).

collateral. Of course, if the change of form did not make the financing statement misleading, the less than diligent secured party will pay the price for its lax search. This analysis concludes that the identity approach is preferable to the Burke approach. But it must overcome two problems in order for the identity approach to be generally applicable.

IV. Substance Over Form: An "Organizational" Interpretation

The two problems of the identity approach are a failure to adequately address the effect of a change of form on the validity of the prechange security agreement, and a failure to provide a clear means of distinguishing between identity changes and third party transfers. While avoiding these two problems, the benefits of the identity approach can be realized by focusing on whether the pre and postchange entities are the same "organization." An entity that is the same organization both pre and postchange should be treated as having undergone an internal change governed by the *second sentence.*

This approach is supported by the policies underlying the U.C.C. The legal form that an entity takes or the fact that an entity changes its form does not affect its treatment under the Code. The U.C.C. is limited to governing commercial relationships. The policies that justify distinguishing entities by their legal form do not apply in the commercial context.[94] The rights and responsibilities that the U.C.C. articulates do not, nor should they, vary with the type of entity involved. For instance, when a seller of goods who breached a duty to a buyer is found liable, the legal form of the seller may play an important role in satisfying the judgment. However, the seller's form does not control the nature or extent of the duty that it breached. Issues internal to the U.C.C. are answered regardless of an entity's legal form. Resolution of those issues depends solely upon the role that the entity plays in the relationship.

The Code has codified this understanding through the expansive definition of "organization," which provides: "'Organization' includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity."[95]

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94. Traditionally, various forms of legal entities have been assigned different characteristics, which impact their relationships with other entities. The doctrine which has grown up to justify treating the various forms of entities differently is limited by the reasoning upon which it is based. For example, the separate existence of a corporation from its founders was recognized on the ground that those founders should be able to limit their liability in order to promote investment. Traditional doctrine provides, therefore, that after a proprietorship incorporates, the corporation should be treated as a separate and distinct entity from the proprietor. *See* HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS 23-35 (3d ed. 1983). The law recognizes the flexible nature of business entities in general. A change in the ownership of a corporation does not change the responsibilities or existence of the corporation. Donnell v. Herring-Hall-Marvin Safe Co., 208 U.S. 267 (1908); Old Dominion Copper Mining & Smelting Co. v. Lewisohn, 210 U.S. 206 (1908). Furthermore, where control of a corporation changes, for example through a wholesale replacement of the board of directors, the corporation remains the same entity. The justification of limited liability does not extend to treating the proprietorship and corporation differently with respect to their obligations under a security agreement.

95. U.C.C. § 1-201(28). The definition has not changed since adopted in the May 1949 draft, where it was codified as § 1-201(23).

By creating an expansive definition of "organization," the drafters created a means for disregarding the legal form of entities for purposes of determining their rights and responsibilities within the U.C.C.[96] The end result of this effort is that the substance,rather than the form of the entity identifies an "organization" for the purposes of the U.C.C. generally, and Article 9 specifically. If the entity changes form, but its substance remains the same, it remains the same organization.

The definition and purpose of the term "organization" has value in interpreting the language of the applicable sections of Article 9 in relation to the U.C.C.'s purposes as a whole. The term "organization" is listed in the *second sentence* as one of the entities that may undergo an "identity change." The placement of that expansive word within the sentence that allows for the continued effectiveness of the financing statement provides the very mechanism by which to apply the substance-based concept of the Code to the effect of changes of corporate form on a pre-change security interest in after-acquired property. Because the U.C.C. is concerned with the role of an entity and not its legal form, the substance rather than the form of an entity should determine the validity of the security interest and financing statement.

Consideration of the definition of "organization" also serves to undermine and discredit a major statutory interpretation argument of the Burke approach. That approach concludes that the *second sentence* does not apply to changes in form because those changes involve more than one debtor and the sentence only states "the debtor." Upon review, however, the definition of debtor is an aid to the identity approach. The definition of organization is included within the definition of "debtor." The definition of debtor includes: "the person who owes payment or other performance of the obligation secured."[97] The definition of person ties "debtor" and "organization" together: "Person" is defined to include an "individual or an organization."[98] Therefore, as long as an entity remains the same organization, it remains the same debtor.

The Comment of the Article 9 Review Committee supports an interpretation of the word "debtor" as focusing on the substance of an organization and not its form. That Comment makes clear that the Committee perceived only two categories of debtors: the same debtors and new debtors.[99] Given the purposes of the Code, the most plausible meaning for "new debtor" is a substantively different organization.

The interpretation that a debtor does not become a different debtor as a result of a change in form is supported by consideration of what such a change resembles. Furthermore, the expectation of the parties supports treating a debtor which has undergone a change of form as the same debtor. One commentator commented on both of these arguments:

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96. The definition of "organization" is expansive because it includes "every type of entity or association, excluding an individual, acting as such." U.C.C. § 1-201 Official Cmt. 28. The exclusion of an "individual, acting as such" from the definition does not have an impact on the purpose of this inquiry, since an individual can only undergo a name change. Any other type of action by an individual (*i.e.* proprietorship) would qualify the individual for treatment as an organization.

97. U.C.C. § 9-105(1)(d).

98. U.C.C. § 1-201(30).

99. Final Report, *supra* note 27, at 244.

> [C]hanges in business form seem more analogous to name changes. If a debtor changes his name, the creditor continues to deal with the same person. So too, if the debtor incorporates, although his legal form has changed, the ultimate players remain the same. . . . Although at law, each entity is an entity unto itself and recognized at law, we all know the law indulges in legal fictions. If the creditor is still talking to, working with and loaning money to the same people, isn't the change in business form like a change in name?[100]

In addition, at least one court has properly criticized the argument that a pre and postchange debtor are separate and distinct: "[T]his reasoning assumes two debtors though factually there is only one."[101]

By construing "organization" to focus on the substance of the entity and not its legal form, the original and successor entities may be regarded as the same organization and therefore the same debtor. The expectations of commercial parties, discussed above, are affirmed.[102] Finally, a plain reading of section 9-402(7) in light of the substance-based interpretation of the above definitions leads to the conclusion that where an entity changes form, but not substance, the change should be governed by the *second sentence*.

A. Solution to the Attachment Problem

Construing "organization" to include both the pre and postchange entities also provides a solution to the attachment problem of the identity approach. As discussed above, an organization that merely undergoes a change in corporate form remains the same debtor. Because the pre and postchange debtors are the same debtor, the signature of the prechange debtor will qualify as the signature of the postchange debtor. Consequently, that prechange signature will remain effective to maintain the validity of the original security agreement against the postchange entity. Therefore, the security interest will attach to collateral acquired after the change by the postchange entity.

B. Factors on Which to Base the Same "Organization" Determination

The issue of whether a change of form or third-party transfer has occurred is focused on whether the pre and postchange entities are the same organization. If they are not, then the postchange debtor is a "different" debtor and a third-party transfer has occurred.

The last step in setting up this new interpretation in support of the identity approach is providing a generally applicable method for determining when a transaction involves the same or a different organization. More practically, this last step requires a decision as to whether the transaction and the resulting effect upon the security interest should be governed by the *second* or *third sentence* of section 9-402(7).

Critics of the identity approach emphasize that such an approach fails to provide a sound basis for a notice system. "[The identity approach] is a weak foundation on which to build a refiling doctrine since it offers no neutral principles upon which one can determine when

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100. 1 UCC Serv. (MB) Sec 6.10[5], at 6-218.

101. First Agri Services v. Kahl, 385 N.W.2d 191, 193 n.5 (Wis. Ct. App. 1986) (citations omitted).

102. According to the expectations of the parties, a successor entity which maintains many of the same essential characteristics as the original entity acts in the capacity as that debtor. In some instances, the similarities may be so pronounced that a secured party is unaware that any change has occurred.

a transfer will be honored and when it will be disregarded."[103] Unfortunately, prior to this point, those critics were correct. The identity approach lacked statutory support and was applied haphazardly, with no court nor commentator proposing a generally applicable analysis that was both reliable and practical. The following approach meets that goal.

The focus of the inquiry is the essential characteristics of an "organization." Additionally, the different traits of an organization that may impact the efficacy of the notice filing system should be considered. The two major considerations of the Article 9 filing system are: first, to provide notice to prospective secured parties of an existing security interest; and second, to ensure that the duty of the present secured party to protect its security interest by monitoring changes in the debtor is not onerous.[104]

1. Ownership and Control.—At first glance, there seems to be an essential and distinguishing trait of an organization: its membership. However, defining an organization by its whole membership may be painting with too broad a brush. It may not be useful for definitional and practical purposes to include the organization's receptionist and janitorial staff as part of its membership. Instead, the proper focus of the membership inquiry is those individuals most deeply involved in the significant business activity of the organization; those individuals or entities that act as owners and those that are in control or act as managers. Therefore, part of the analysis must focus on the ownership and control of the entity immediately prior to and after the change to determine whether the postchange entity is the same organization.

Focusing on the elements of ownership and control of the pre and postchange entities to determine whether an identity change has occurred is supported by one of the main reasons the identity approach is preferred to the Burke approach. The identity approach blocks a debtor from cutting off a valid security interest in after-acquired property by altering its corporate form. An effort aimed at avoiding such activity should focus on the typical characteristics of such a debtor. Generally, an organization attempting to circumvent a security interest maintains the same ownership and control throughout the change. If the ownership and control are different after a change, then the likelihood that the transaction was a bona fide transfer to a third party increases. It follows that the greater the similarity in ownership and control, pre and postchange, the greater the likelihood that an identity change has occurred.[105]

Looking to the ownership and control of the debtor to determine whether an identity change has occurred is also supported by practical considerations. An important part of a secured transaction is the individual or individuals who form the relationship between the secured party and debtor. If the individuals who comprise the debtor are the same before and after the change, a secured party is less likely to become aware of a change affecting his

103. Burke, *supra* note 51, at 1092.

104. U.C.C. § 9-402 Official Cmt. 2.

105. Courts have previously relied on ownership and control in finding that a transaction resulted in an identity change. For example, the Ninth Circuit focused on ownership of the pre and postchange debtor to hold: "We conclude as a matter of law that the security agreement executed by the proprietorship continued to be effective as to the accounts receivable generated by the corporation after the change in entity status." Towers v. B.J. Holmes Sales Co., 637 F.2d 707, 709 (1981). *See also* Cohutta Mills v. Small Business Admin., 108 B.R. 815 (Bankr. N.D. Ga. 1989), discussed *supra* at notes 46-47.

security interest. Furthermore, the presence of the same people in the pre and postchange entity provides prospective secured parties with the resources to learn about prior forms of the entity and any liens against its property.

2. Line of Business and Location.—The reasoning which places importance on the ownership and control of the pre and postchange entities extends to place importance on whether a debtor maintains the same line of business and the same location. Both considerations may act to mislead current secured parties as to identity or offer prospective leads to prospective secured parties searching for prior liens. For instance, where the prechange entity stays in the same location, a present secured party would probably not realize that a change in form had occurred. It is unlikely that a transfer of assets to an entity located in the same location as the transferor was a transfer to an unrelated party. Additionally, an entity that merely changes form would probably continue in the same line of business. Adding the pre and postchange entities' line of business to the analysis offers an additional factor that therefore improves the accuracy and certainty of the approach.[106]

Application of these factors without guidance raises two problems. First, it fails to provide parties with an understanding of what consequences they may expect from changes of form. Second, it provides little guidance to courts applying the approach. This results in inconsistent opinions and fact-sensitive deliberations. A clear rule of general application that commercial actors are capable of following is preferable. Therefore, the analysis of the identity approach should be structured and limited to considering relevant factors in a way that provides clear and consistent results. The inquiry should be limited to comparing the four factors listed above immediately prior to and following the transfer to the postchange entity.[107]

Where the four factors are identical immediately pre and postchange, the transaction should be treated as an identity change. The four factors must be essentially identical, otherwise the certainty of the approach is undermined. Where the debtor has changed legal form in an attempt to circumvent the original security interest, minor dissimilarities may be overlooked. Courts must keep in mind that the more the factors are dissimilar and they use their discretion to find an identity change, the greater effect the ruling will have on undermining the efficiency of the notice filing system and the stability of commercial conduct generally.[108] As a result, judicial discretion should be used sparingly.

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106. The more factors available to courts in determining whether an identity change has occurred, the more precise and clear the analysis provided by the courts. The clearer the analysis, the more commercial parties are able to forecast the results and consequences of their conduct, and plan accordingly.

107. The relevant points in time are immediately before and after the actual change. Since all four of the factors may change during the course of an organization's existence, their value in this deliberation is at the time of the transfer itself. The focus at this time causes the identity approach to arrive at a result with the same level of certainty as the Burke approach. *See* Bluegrass Ford-Mercury v. Farmers Nat'l Bank of Cynthiana, 942 F.2d 381 (6th Cir. 1991).

108. Where all but one share of a successor corporation is owned by the same persons who owned the original debtor, the change should be treated as an identity change. These facts were held to constitute a transfer to an unrelated party in *Bank of Yellville v. Scott*, 113 B.R 516 (Bankr. W.D. Ark. 1990) (decided under the Burke approach).

V. Proposed Legislative Response

Though the "organizational approach" may be used by courts under the current language of the U.C.C., some legislative action is preferable. That action would ensure application of the identity approach and the protection of current secured parties.

As shown above, actual revision of the text of the Uniform Commercial Code is not necessary to apply the modified interpretation of the identity approach. However, legislatures could adopt some variation of the following as an "Official Comment" to the following sections to make clear their intent that the identity approach should be applied where a pre and postchange entity are the same organization:

> 1-102(28) "organization":
>
> An organization remains the same organization, notwithstanding a change in corporate form, where all of the following four factors are substantially similar immediately before and after the change in corporate form: ownership of the entity; individuals that manage or control the entity; location of the entity's business or offices; and the entity's line of business.
>
> 9-203(1)(a):
>
> A debtor that undergoes a change in corporate form remains the same debtor where it is the same "organization" under section 1-201(28). As a result of being found the same debtor, the pre-change signature of the debtor shall be effective to continue the validity of the security agreement to collateral acquired after the change.
>
> 9-402(7):
>
> The second sentence of section 9-402(7) is intended to cover instances where a debtor changes corporate form but remains the same "organization" under section 1-201(28). Where a change in form results in a different "organization," the effectiveness of the financing statement is governed by the third sentence of section 9-402(7).

Conclusion

The different results that the identity approach and Burke approach reach on any given set of facts provide a disruptive context for parties to predict the consequences of their actions as well as for courts to resolve conflicts. A postperfection change in form has a large impact upon the parties to a secured transaction, as well as to others affected by the status of the security interest. The above discussion outlines a method for resolving postperfection changes that provides courts with a statutorily valid means to enforce the expectations of the parties in a way that promotes certainty.

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NOTES

A PROPOSAL TO END JURISDICTIONAL COMPETITION IN PARENT/NON-PARENT INTERSTATE CHILD CUSTODY CASES

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INTRODUCTION

> Fortunately, the time has long past when children in our society were considered the property of their parents. Slowly, but finally, when it comes to children even the law has rid itself of the *Dred Scott* mentality that a human being can be considered a piece of property "belonging" to another human being. To hold that a child is the property of his parents is to deny the humanity of the child.[1]

It would be a much simpler world if children were considered their parents' property without rights of their own. However, trends in the law and psychological studies within the past twenty-five to fifty years have increased the awareness that children have rights the law should protect and psychological needs that demand attention.[2]

In recent years, the volume of child custody disputes has increased dramatically.[3] With the rise of divorce and single parenthood in American society, the number of traditional families, in which the father supports the mother and children, has substantially declined in the latter half of the twentieth century.[4] Multiple marriages, domestic partnerships and other non-traditional arrangements inevitably lead to the development of family relationships between children and non-biological parents living in the same home.[5] It is not surprising

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Thank you to Professors Helen P. Garfield and David R. Papke for guidance in writing this note. Thank you also to the Juvenile Unit of Legal Aid of Western Missouri, in Jackson County Juvenile Court, whose strong advocacy for children's rights inspired this Note.

1. *In re* John Doe, 627 N.E.2d 648, 651-52 (Ill. App. Ct. 1993).

2. *See infra* subpart I.B. *See generally* JOSEPH GOLDSTEIN, ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (new ed. with epilogue, 1979). This book was one of the most controversial and influential studies in the field of children's psychological needs. One of its notable contributions was support for the doctrine of "psychological parents." The authors argued that children have a strong need to preserve their relationship with their primary caretaker even if the caretaker is not a biological parent, and that disruption in this disposition can be very detrimental. *See, e.g., id.* at 40-42, 48-49, 79.

3. One definition of a child custody order is "a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications." Parental Kidnapping Prevention Act of 1980, 28 U.S.C.§ 1738A(b)(3) (1994).

4. *See* Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 906 n.643 (1979).

5. *See generally* People v. Hasse, 291 N.Y.S.2d 53, 55 (1968) ("Family" commonly refers to parents

that these non-biological parental figures have sought custody of children with whom they have formed "parent-child" relationships.[6] Whether the parties seeking custody are two biological parents, one parent and one non-parent, or two non-parents, it is rare that either contestant is clearly the better-suited care-giver.[7] Rather, because of the parties' emotional attachments to the child in question, each party zealously attempts to persuade the court of his or her superior qualification as care-giver. Courts struggle to make dispositions, but emotional pain to the child usually results no matter what the decision.

Interstate custody disputes have traditionally created intractable jurisdictional dilemmas in two respects: in establishing which state has jurisdiction; and, once that is determined, in making a custody disposition.[8] The uncertainty does not end there, however. Courts further grapple with the need to determine which jurisdiction may properly modify the first forum's decision.[9] Often, a second forum asserts this authority.

Three factors combine to complicate interstate child custody disputes: child custody decrees are, by nature, often subject to modification when the child's circumstances change; the fifty states are co-equal sovereigns; and, interstate movement is extremely common.[10] The Uniform Child Custody Jurisdiction Act (UCCJA),[11] adopted by all fifty jurisdictions

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and children, "a group . . . constituting the fundamental social unit in a civilized society."); Hartley v. Bohrer, 11 P.2d 616, 618 (Idaho 1932) (Family is defined as a "collective body of persons who form one household, under one head . . . and who have reciprocal, natural or moral duties to support and care for one another."); Collins v. Northwest Casualty Co., 39 P.2d 986, 989 (Wash. 1935) (Family "conveys the notion of some relationship, blood or otherwise.").

6. Partners of biological parents are not the only ones who seek custody. There are many other arrangements where third parties declare the right to sue for custody, such as relatives or friends with whom a biological parent has voluntarily placed the child (*e.g.*, Hoy v. Willis, 398 A.2d 109 (N.J. Super. Ct. App. Div. 1978)), foster parents (*e.g.*, *In re* B.G., 523 P.2d 244 (Cal. 1974)), and prospective adoptive parents where the adoption fails (*e.g.* DeBoer v. Schmidt, 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom.* DeBoer v. DeBoer, 114 S. Ct. 1 (1993), *stay denied*, 114 S. Ct. 11 (1993)).

7. In disputes between two parents or between two non-parents, the nearly universal standard is the "best interest interests of the child standard." Eric P. Salthe, Note, *Would Abolishing the Natural Parent Preference in Custody Disputes Be In Everyone's Best Interest?*, 29 J. FAM. L. 539, 539 (1990-1991). For a discussion of the split among jurisdictions over which standard to apply in parent/non-parent disputes, *see infra* subpart I.B.2.c.

8. "The United States Supreme Court has failed to remedy the jurisdictional problems that have arisen in child custody disputes, particularly in regard to the application of full faith and credit principles in such cases." Thomas Steele, Lemley v. Barr: *Who Gets Baby Ryan and Who Should Decide?*, 89 W. VA. L. REV. 415, 419 (1987). Although the Court has made known its availability for judicial resolution of jurisdictional disputes under the Parental Kidnapping Prevention Act, it has yet to actually do so. *See* Thompson v. Thompson, 484 U.S. 174, 187 (1988). *See also infra* note 12 and accompanying text.

9. Steele, *supra* note 8, at 419.

10. Roger M. Baron, *Federal Preemption in the Resolution of Child Custody Jurisdiction Disputes*, 45 ARK. L. REV. 885, 886 (1993).

11. UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 123 (1968) [hereinafter UCCJA]. *See infra* subpart II.A. All fifty states and the District of Columbia have adopted versions of the UCCJA, with relatively little alteration to the Uniform Act. *See* ALA. CODE §§ 30-3-20 to -44 (1989); ALASKA STAT. §§ 25.30.010 to .910 (1991); ARIZ. REV. STAT. ANN. §§ 8-401 to -424 (1989 & Supp. 1991); ARK. CODE ANN. §§ 9-13-201 to -228 (Michie 1993); CAL. FAM. CODE §§ 3400-3425 (West 1994); COLO. REV. STAT. ANN. §§ 14-13-101 to -126 (West

within the last twenty-five to thirty years, and the federal Parental Kidnapping Prevention Act of 1980 (PKPA)[12] were enacted to create guidelines for establishing jurisdiction for and granting full faith and credit to interstate child custody disputes. They apply to almost every interstate custody case.[13] Unfortunately, the Acts do not completely resolve the complicated jurisdictional problems that arise. The two driving policies of the Acts are to deter childsnatching and to promote children's best interests. However, these two policies cannot always be simultaneously accomplished.[14]

This Note focuses on jurisdictional uncertainty in child custody cases, which exists because states follow non-uniform interpretations of the Acts. Jurisdictional uncertainty is particularly prevalent in cases where one contestant is a non-parent: Non-uniform interpretation of the Acts is complicated by the difference in forums' law governing parent/non-parent custody disputes. This Note proposes that courts consider granting a best interests hearing, even if state law does not require it, in order to prevent other states from modifying a previous forum's decision on the basis of the first forum's refusal to adjudicate the child's best interests.

1989 & Supp. 1993); CONN. GEN. STAT. ANN. §§ 46b-90 to -114 (West 1986), DEL. CODE ANN. tit. 13, §§ 1901-1925 (1993); D.C. CODE ANN. §§ 16-4501 to -4524 (1989); FLA. ST. ANN. §§ 61.1302 to .1348 (West 1985); GA. CODE ANN. §§ 19-9-40 to -64 (1991); HAW. REV. STAT. §§ 583-1 to -26 (1993); IDAHO CODE §§ 32-1101 to -1126 (1983); ILL. ANN. STAT. ch. 40, para. 2101-2126 (Smith-Hurd 1980 & Supp. 1991); IND. CODE ANN. §§ 31-1-11.6-1 to -24 (West 1979 & Supp. 1994); IOWA CODE ANN. §§ 598A.1 to .25 (West 1981 & Supp. 1994); KAN. STAT. ANN. §§ 38-1301 to -1326 (1993); KY. REV. STAT. ANN. §§ 403.400 to .630 (Michie/Bobbs-Merrill 1984); LA. REV. STAT. ANN. §§ 13:1700 to :1724 (West 1983 & Supp. 1994); ME. REV. STAT. ANN. tit. 19, §§ 801-824 (West 1981); MD. CODE ANN., FAM. LAW §§ 9-201 to -224 (1991); MASS. GEN. LAWS ANN. ch. 209B, §§ 1-14 (West 1987); MICH. STAT. ANN. §§ 600.651-.673 (West 1981 & Supp. 1994); MINN. STAT. ANN. §§ 518A.01 to .25 (West 1990); MISS. CODE ANN. §§ 93-23-1 to -47 (1994); MO. ANN. STAT. §§ 452.440 to .550 (Vernon 1986); MONT. CODE ANN. §§ 40-7-101 to -125 (1993); NEB. REV. STAT. §§ 43-1201 to -1225 (1988); NEV. REV. STAT. §§ 125A.010 to .250 (1993 & Supp. 1993); N.H. REV. STAT. ANN. §§ 458-A:1 to :25 (1992); N.J. STAT. ANN. §§ 2A:34-28 to -52 (West 1987 & Supp. 1994); N.M. STAT. ANN. §§ 40-10-1 to -24 (Michie 1994); N.Y. DOM. REL. LAW §§ 75-a to -z (McKinney 1988); N.C. GEN. STAT. §§ 50A-1 to -25 (1989); N.D. CENT. CODE §§ 14-14-01 to -26 (1981); OHIO REV. CODE ANN. §§ 3109.21 to .37 (Anderson 1989 & Supp. 1993); OKLA. STAT. ANN. tit. 43 §§ 501-527 (West 1990); OR. REV. STAT. §§ 109.700 to .930 (1989); 23 PA. CONS. STAT. ANN. §§ 5341-5366 (1991); R.I. GEN. LAWS §§ 15-14-1 to -26 (1988 & Supp. 1993); S.C. CODE ANN. §§ 20-7-782 to -830 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. §§ 26-5A-1 to -26 (1992); TENN. CODE ANN. §§ 36-6-201 to -225 (1991); TEX. FAM. CODE ANN. §§ 11.51 to .75 (West 1986); UTAH CODE ANN. §§ 78-45c-1 to -26 (1992 & Supp. 1994); VT. STAT. ANN. tit. 15, §§ 1031-1051 (1989); VA. CODE ANN. §§ 20-125 to -146 (Michie 1990 & Supp. 1994); WASH. REV. CODE ANN. §§ 26.27.010 to .930 (West 1986); W. VA. CODE §§ 48-10-1 to -26 (1992); WIS. STAT. ANN. §§ 822.01 to .25 (West 1994); WYO. STAT. §§ 20-5-101 to -125 (1994).

12. 28 U.S.C. § 1738A (1988) [hereinafter PKPA]. *See infra* subpart II.B.

13. *See infra* notes 147-49, 166-68 and accompanying text.

14. For a very recent examination of both Acts urging that they be repealed, see Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 25 U.C. DAVIS L. REV. 845 (1992) (The "heart of the UCCJA's indeterminacy" is the friction between the goal of flexibility (ability to determine each case individually) and repose (certainty and finality in adjudications). *Id.* at 902.).

I. Jurisdictional Uncertainty

Like many other bodies of law, the law governing interstate child custody decisions has two paramount goals: flexibility and certainty. Flexibility is required because courts must respond to varying sets of circumstances, and an appropriate decision must be made in each particular case. Simultaneously, the law must establish certain, predictable parameters on individuals' behavior in order to deter childsnatching and achieve a state of repose in adjudication of child custody disputes.

A. Flexibility vs. Certainty

Analysis of three recent cases reveals the need for both flexibility and certainty in the adjudication of interstate child custody cases. The cases exhibit that courts in different forums vary in the emphasis they place on flexibility to determine an equitable outcome, and on certainty to enforce legal rights. They are similar in that they involve interstate child custody decisions where one contestant is a non-parent. In cases where both contestants are biological parents (or both are non-parents), courts uniformly apply a "best interests of the child" standard.[15] However, where one contestant is a non-parent, forums apply different standards of law to make the custody disposition.[16]

One particularly notable case, which received attention both within and outside of the legal community, revealed the tension between these two policies: In a quagmire of jurisdictional complications, the child's best interests may have been undermined in the interest of jurisdictional certainty. Although the United States Supreme Court ultimately declined to hear the case, the dissent from that denial highlighted the incongruity in disputes over jurisdiction in interstate child custody cases involving non-parent contestants.[17] When Cara Clausen,[18] a citizen of Iowa, discovered she was pregnant, she did not inform the father, Daniel Schmidt.[19] Realizing that she was not prepared to care for a baby, she opted for adoption.[20] When Jessica was born in February, 1991, the man Cara named as the father signed a release of his parental rights.[21] The Iowa court system terminated the parental rights of the mother and putative father, and custody of the child was awarded to the prospective adoptive parents, Roberta and Jan DeBoer, Michigan residents.[22]

Nine days later, Cara decided to challenge the termination. The real father's parental rights had not been terminated because Daniel Schmidt, not the man named on the birth certificate, was the biological father.[23] Daniel filed an affidavit of paternity and moved to

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15. *In re* Marriage of Hruby and Hruby, 748 P.2d 57, 62-63 (Or. 1987) (en banc).

16. *See infra* subpart I.B.2.c.

17. DeBoer v. Schmidt, 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom.* DeBoer v. DeBoer, 114 S.Ct. 1 (1993), *stay denied*, 114 S.Ct. 11 (Blackmun, J., and O'Connor, J., dissenting).

18. The mother's name is now Cara Schmidt since she married Daniel Schmidt in April 1992.

19. *In re* B.G.C., 496 N.W.2d 239, 241 (Iowa 1992).

20. *Id.* at 240.

21. *Id.* at 241.

22. *Id.*

23. DeBoer v. Schmidt, 502 N.W.2d 649, 652 (Mich. 1993), *stay denied sub nom.* DeBoer v. DeBoer, 114 S. Ct. 1 (1993), *stay denied,* 114 S. Ct. 11 (1993).

intervene in the adoption.[24] The DeBoers filed a motion to terminate the parental rights of Daniel, attempting to show that he was unfit as a parent because he had abandoned two other children.[25] The Iowa trial court tried the issues of paternity, termination of parental rights, and adoption, but did not hear arguments nor evidence on the matter of the child's best interests.[26] The court decreed that Daniel had established that he was the father of the child, and that the DeBoers had failed to prove that Daniel was an unfit parent.[27] Because the grounds for termination of Daniel's parental rights under Iowa law had not been fulfilled, the trial court (in a decision affirmed by the Supreme Court of Iowa) granted custody to him.[28] On remand from the Supreme Court of Iowa, the District Court ordered the DeBoers to appear with the child on December 3, 1992.[29]

Although their attorney informed the court that the DeBoers had received actual notice, they did not appear at this hearing.[30] Instead, the DeBoers filed a petition the same day in the Washtenaw Circuit Court in Michigan (the county of their residence) to have that court take jurisdiction under the UCCJA and either enjoin the Iowa order or modify it to give the DeBoers custody.[31] The court issued a temporary restraining order, and, after a hearing, found that it had jurisdiction to determine the best interests of the child, which had never been adjudicated in Iowa.[32] The court concluded that the child should remain with the DeBoers.[33] However, the Michigan Court of Appeals reversed, finding that Michigan lacked jurisdiction under the UCCJA and the PKPA and was mandated to give full faith and credit to the Iowa decision.[34] When this decision was affirmed by the Supreme Court of Michigan[35] (two and one-half years after the adoption petition was filed immediately following Jessica's birth), the DeBoers complied and relinquished custody.

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24. *Id.*

25. *In re* B.G.C., 496 N.W.2d 239, 244-45 (Iowa 1993).

26. *DeBoer*, 502 N.W.2d at 652-53.

27. *Id.*

28. *In re* B.G.C., 496 N.W.2d at 241. Another problem with the release was that Iowa's statutory requirements were not fulfilled in regards to the waiting period a mother is guaranteed after birth. "It is undisputed that Cara's release did not satisfy the seventy-two-hour requirement of section 600A.4(2)(d)." *Id.* at 243. *See* IOWA CODE § 600A.4(2)(d) (1976 & Supp. 1992).

29. *DeBoer*, 502 N.W.2d at 653.

30. *Id.* Subsequent to that proceeding, warrants were issued for the arrest of Jan and Roberta DeBoer. *Id.* at 653 n.9.

31. *Id.* at 653.

32. *Id.* The Iowa courts did not find it necessary to adjudicate the child's interests since the case was disposed of on the grounds of failure to meet the statutory requirements for termination of parental rights. *In re* B.G.C., 496 N.W.2d 239, 245 (Iowa 1993).

33. *DeBoer*, 502 N.W.2d at 653.

34. Matter of Clausen, 501 N.W.2d 193, 196-97 (Mich. Ct. App. 1993), *aff'd sub nom.* DeBoer v. Schmidt, 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom.* DeBoer v. DeBoer, 114 S. Ct. 1 (1993), *stay denied,* 114 S. Ct. 11 (1993).

35. *DeBoer*, 502 N.W.2d at 668.

The DeBoers' appeal to United States Supreme Court for a stay of the Michigan order was denied.[36] Justice Blackmun (joined by Justice O'Connor) dissented from the denial of stay, noting:

> While I am not sure where the ultimate legalities or equities lie, I am sure that I am not willing to wash my hands of this case at this stage, with the personal vulnerability of the child so much at risk, and with the Supreme Court of New Jersey [in the *E.E.B.* decision] and the Supreme Court of Michigan in fundamental disagreement over the duty and authority of state courts to consider the best interests of a child when rendering a custody decree.[37]

The case became a *cause celebre* in the national media. Among other things, the legal system received criticism for allowing this situation to persist for so long and for disbanding a very happy trio (Jessica and her adoptive parents).[38]

The case highlights the inherent tension in interstate cases governed by the UCCJA and PKPA. While Michigan's refusal to modify the Iowa decision creates jurisdictional certainty (in that Michigan did not compete with Iowa for jurisdiction), this refusal may also have jeopardized the child's best interests. Removal of a two and one-half year old child from the family with whom she has bonded since birth jeopardizes her psychological welfare.[39] In Jessica's case, certainty of outcome was achieved at the expense of flexibility to reach a resolution of her best interests. In his dissent from the Michigan Supreme Court decision, Justice Levin noted that under the PKPA, Congress did not mandate Iowa nor any other jurisdiction to conduct a best interests hearing since the statute governs only jurisdiction.[40] However, he also asserted that "[i]t does not follow that a decree rendered without consideration of the child's best interests is entitled to enforcement under the PKPA, where the court rendering the decree *declined to exercise jurisdiction to conduct a hearing to consider whether to modify the decree on the basis of the child's best interests*."[41] It may be impossible to achieve the right balance between certainty and flexibility in outcome, but two other cases have found different solutions. In his above-quoted dissent to the denial of stay, Justice Blackmun relied on two cases analyzed by Justice Levin that interpreted the Acts

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36. DeBoer v. DeBoer, 114 S. Ct. 1 (1993), DeBoer v. Schmidt, 114 S. Ct. 11 (1993) (Blackmun, J., and O'Connor, J., dissenting).

37. DeBoer v. Schmidt, 114 S. Ct. 11, 11-12 (1993). *See infra* notes 42-48.

38. Members of the media made the unfortunate choice to bring cameras to the actual separation, where Jessica was carried out of the house, obviously very upset to be leaving her home. *See, e.g.*, Greg Smith, *Baby Jessica Takes to New Life, New Name,* L.A. TIMES, Aug. 7, 1994, at A10; Geoffrey Cowley, *Who's Looking After the Interest of Children?*, NEWSWEEK, August 16, 1993, at 54. As often happens in child custody disputes, neither side had totally clean hands: Cara committed a fraud on the court by intentionally naming the wrong man as father; and, the DeBoers were criticized by many people for asserting custody rights for almost three years, even though they had notice within weeks of the placement that the adoption could fail. If they had relinquished custody earlier, the separation would have been less traumatic for the child.

39. *See generally* source noted in *supra* note 2.

40. DeBoer v. Schmidt, 502 N.W.2d 649, 682 (Mich. 1993) (Levin, J., dissenting), *stay denied sub nom.* DeBoer v. DeBoer, 114 S. Ct. 1 (1993), *stay denied,* 114 S. Ct. 11 (1993). *See infra* subpart II.B.

41. *DeBoer,* 502 N.W.2d at 682.

more liberally, *E.E.B. v. D.A.*, and *Lemley v. Barr*.[42] In these two cases, the courts were willing to consider the child's rights over the parent's rights.

In *E.E.B. v. D.A.*, a 1982 New Jersey Supreme Court case, a mother decided to give her child up for adoption one month before birth. She and the father, both Ohio residents, signed releases surrendering custody three days after the child's birth. After birth, the child was immediately placed with the prospective adoptive parents, who lived in Ohio at the time. One week after signing the release, the biological mother orally revoked her release of parental rights to the welfare department. The department did not inform the Ohio Juvenile Court and the court validated the original consent. The mother then instituted a habeas corpus proceeding to regain custody of her child.

While appeal of the denial of the writ to the Supreme Court of Ohio was pending, the adoptive parents were transferred to New Jersey. The Supreme Court of Ohio reversed and remanded, finding that the mother had revoked her consent before the juvenile court approved her waiver of rights.[43] However, the adoptive parents challenged the Ohio decision in the Superior Court of New Jersey, Chancery Division. The New Jersey court found that it had jurisdiction to hold a hearing to determine the child's best interests, and decided that it was in the best interests of the child to remain with the adoptive parents.[44] The decision was affirmed by the New Jersey Supreme Court, which framed the issue as whether "by failing to grant a best interest hearing, the Ohio courts declined to exercise jurisdiction to modify the decree awarding custody to the natural mother."[45] The court reasoned that Ohio's refusal entitled New Jersey to exercise jurisdiction, and justified its position by noting that "[t]his result comports with the congressional intent that child custody decisions be made in the state best able to determine the best interest of the child."[46] The New Jersey court construed the UCCJA and the PKPA more liberally than the Michigan *DeBoer* courts did[47] in order to render a decision that would promote the child's best interests: The "UCCJA does not contemplate blind obedience to home state jurisdiction. The state to decide a child custody dispute is not necessarily the home state, but the one best positioned to make the decision based on the best interest of the child."[48]

Four years later, an Ohio custody order again was challenged in another state—West Virginia. In *Lemley v. Barr*, a 1986 case from the Supreme Court of Appeals of West Virginia,[49] the natural mother signed the parental release twice: once when she was a minor, and again when she was past the age of eighteen (only one week later). Subsequently, the mother and her parents (the "Lemleys") tried to revoke the waiver they had executed with

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42. *Id.*, referring to: E.E.B. v. D.A., 446 A.2d 871 (N.J. 1982), *cert. den.*, 459 U.S. 1210 (1983); and, Lemley v. Barr, 343 S.E.2d 101 (W. Va. 1986). *See DeBoer*, 502 N.W.2d at 671-72, 680-82. For a criticism of *E.E.B.* as a violation of the policies behind the UCCJA and the PKPA and an inducement to forum shopping, see Goldstein, *supra* note 14, at 906-09, 931-32.

43. *E.E.B.*, 446 A.2d at 874.

44. *Id.*

45. *Id.* at 877.

46. *Id.*

47. *See supra* text accompanying notes 33-35.

48. *E.E.B.*, 446 A.2d at 879. For a more thorough discussion of the UCCJA and the PKPA, see *infra* Part II.

49. 343 S.E.2d 101.

attorneys for the adoptive parents, and when that proved unsuccessful, instituted a habeas corpus action. The Ohio Court of Common Pleas found that the mother had signed the consent under duress, and that since she did not understand the complaint, it was invalid.[50] The Ohio Court of Appeals and the Supreme Court of Ohio both affirmed.[51]

The adoptive parents (the "Barrs"), were residents of West Virginia. They had been aware of the Ohio proceedings but intentionally chose not to appear and to continue with the adoption process in West Virginia. The Lemleys appealed the adoption in the West Virginia courts. The Supreme Court of Appeals of West Virginia found that under the UCCJA, Ohio had properly exercised jurisdiction.[52] Therefore, the natural mother had legal custody under the Ohio decisions. However, the court's analysis went one step further in remanding to the lower court to decide whether the mother's legal right was outweighed by the child's equitable rights.[53] The Ohio courts had not adjudicated the child's best interests. The West Virginia Supreme Court remanded the case for a decision on whether it was in the child's best interest to remain with the adoptive parents:

> The day is long past in the State, if it had ever been, when the right of a parent to the custody of his or her child, where extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude.[54]

The different outcomes of these three cases reveal a startling inconsistency between states regarding their willingness to acknowledge that adjudication of a child's best interests must be a part of any custody decision.[55]

B. Two-tiered Jurisdictional Uncertainty

These cases resulted in jurisdictional uncertainty because of two factors: historically, the law has been unresolved as to whether child custody decisions warrant full faith and credit

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50. *Id.* at 103.

51. *Id.*

52. *Id.* at 106. In the *DeBoer* case, Justice Levin pointed out that "*Lemley* did not consider the PKPA, but since the PKPA is modeled on the UCCJA, and the relevant language is identical, the analysis of the West Virginia Supreme Court is not to be faulted simply because it did not consider the PKPA separately from the UCCJA." DeBoer v. Schmidt, 502 N.W.2d 649, 671 n.18 (Mich. 1993) (Levin, J., dissenting), *stay denied sub nom.* DeBoer v. DeBoer, 114 S. Ct. 1 (1993), *stay denied*, 114 S. Ct. 11 (1993). For a discussion of that case, see *supra* notes 17-42 and accompanying text.

53. *Lemley*, 343 S.E.2d at 109.

54. *Id.* (quoting Bennett v. Jeffreys, 356 N.E.2d 277, 281 (N.Y. 1976) (citations omitted)).

55. It is beyond the scope of this Note to advocate one of these positions over another. Rather, it is sufficient to note that courts vary in their willingness to balance children's rights against parents' rights. Because of this discrepancy, some jurisdictions are more willing than others to modify a child custody decision.

under the Constitution; and, from state to state, the legal standard applied to parent/non-parent child custody disputes differs. The combination of these two factors makes it difficult for courts to reach a disposition that is both legally and equitably sound. In other words, this combination of factors makes it hard for courts to strike a balance between certainty and flexibility in their adjudication of these cases.

1. Historic Full Faith and Credit Problems.—The historic lack of full faith and credit in child custody decisions led to two results: seize-and-run behavior and forum shopping.[56] A noncustodial individual would "seize" a child and "run" to a forum that was likely to modify a previous custody order and place the child in that individual's custody. Although kidnapping is often attributed to strangers who abduct children for evil motives, a far more typical scenario occurs when the abductor, although not acting in good faith, is a family member or pseudo-family member (parent, step-parent, grandparent, prospective adoptive parent in a failed adoption, etc.) with at least a quasi-right to custody.[57] Parental kidnapping has been characterized as "one of the most subtle and brutal forms of child abuse."[58] Formerly, it was not uncommon for such a person to obtain a custody decree in their favor in a second forum, using the child's presence in the state as a basis for jurisdiction, even if the child had been wrongfully removed from the legal custodian and had minimal contacts with the second forum. Before the enactment of the UCCJA and the PKPA, enforcement of interstate child custody orders was loosely based on principles of comity,[59] but there was very little uniformity in enforcement of interstate orders. Rather, unfettered jurisdictional competition prevented a state of repose in custody determinations.

One commentator has pointed to two pervasive problems that existed prior to the UCCJA and the PKPA in child custody decisions where all parties did not live in the same state: too many interested forums and too little interstate deference:[60]

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56. *See* Brigitte M. Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 FAM. L.Q. 203, 203-04 (1981) (Professor Bodenheimer, the Reporter for the Special Committee appointed by the National Conference of Commissioners to draft the UCCJA, was instrumental not only in drafting the Act, but in lobbying for its enactment in many jurisdictions.). *See also* UCCJA, Table of Jurisdictions, Prefatory Note, paras. 1-6. For an explanation of the National Conference of Commissioners, see *infra* note 139.

57. *See, e.g.*, Norsworthy v. Norsworthy, 713 S.W.2d 451 (Ark. 1986); Nehra v. Uhlar, 372 N.E.2d 4 (N.Y. 1977).

58. *Moving to Stop Child Snatching*, TIME, Feb. 27, 1978, at 85 (quoting psychologist Dr. Philip Weeks).

59. Comity has been defined as "[c]ourtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will." BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

60. Goldstein, *supra* note 14, at 864-68. Additionally, the United States Congress made the following statement about the problem in the existing system, which prompted enactment of legislation:

(a) The Congress finds that—

> (1) there is a large and growing number of cases annually involving disputes between persons claiming rights of custody and visitation of children under the laws, and in the courts, of different States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States;
>
> (2) the laws and practices by which courts of those jurisdictions determine their jurisdiction to decide such disputes, and the effect to be given the decisions of such disputes by the courts of other jurisdictions, are often inconsistent and conflicting;

> [T]he problem is imbedded in the very structure of our legal system. . . . Some form of the problem is inherent in a federal system like ours, which allocates child custody adjudication to autonomous state tribunals, so long as custody litigants, like other citizens, may move freely from state to state, and our courts continue to use the best interests of the child—or any other indeterminate test—to reach custody decisions that are modifiable during the child's's minority.[61]

The United States Supreme Court has always recognized that the field of family law is a matter of state law in which the federal government will not interfere.[62]

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(3) those characteristics of the law and practice in such cases, along with the limits imposed by a Federal system on the authority of each such jurisdiction to conduct investigations and take other actions outside its own boundaries, contribute to a tendency of parties involved in such disputes to frequently resort to the seizure, restraint, concealment, and interstate transportation of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of various jurisdictions, and interstate travel and communication that is so expensive and time consuming as to disrupt their occupations and commercial activities; and

(4) among the results of those conditions and activities are the failure of the courts of such jurisdictions to give full faith and credit to the judicial proceedings of other jurisdictions, the deprivation of rights of liberty and property without due process of law, burdens on commerce among such jurisdictions and with foreign nations, and harm to the welfare of children and their parents and other custodians.

(b) For those reasons it is necessary to establish a national system for locating parents and children who travel from one such jurisdiction to another and are concealed in connection with such disputes, and to establish national standards under which the courts of such jurisdictions will determine their jurisdiction to decide such disputes and the effect to be given by each such jurisdiction to such decisions by the courts of other such jurisdictions.

(c) The general purposes of sections 6 to 10 of this Act . . . are to—

(1) promote cooperation between State courts to the end that a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child;

(2) promote and expand the exchange of information and other forms of mutual assistance between States which are concerned with the same child;

(3) facilitate the enforcement of custody and visitation decrees of sister States;

(4) discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) *avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; and*

(6) deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards.

Parental Kidnapping Prevention Act, Pub.L. No. 96-611, 94 Stat. 3568 § 7 (1980) (emphasis added).

61. Goldstein, *supra* note 14, at 853-54.

62. "[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." Rose v. Rose, 481 U.S. 619, 625 (1987) (quoting *Ex Parte* Burrus, 136 U.S. 586, 593-94 (1890)).

Historically, the first problem is that in interstate custody decisions, there are too many interested forums. For example, consider a case where a single mother informally places her child with her parents for two to three years while she finishes her education. The grandparents move to another state shortly after the mother places the child with them. When the mother returns for the child, if the grandparents refuse to relinquish custody, two states have an interest in the outcome of the case: the state where the child was born, and the state where the child now lives. Additionally, the grandparents, who have retained custody, would naturally have a serious claim on the child's affection the longer they remained together. As "[m]ost American children are integrated into an American community after living there six months,"[63] it could be very detrimental to force the child to leave his or her home. There is an infinite number of possible scenarios where more than one state would be interested in the outcome of custody litigation. Such situations inevitably arise because of state-to-state mobility is so common.

The second historical problem with child custody litigation prior to the UCCJA and the PKPA is closely related to the first. Because there were many interested forums, often there were multiple and conflicting custody orders. If a party did not like the outcome in one decision, they simply went to another state and got another order. If the party deprived of custody did the same thing, the struggle could continue for years and harm to the child was certain to follow.[64] The drafters of the UCCJA noted that the trend had been to allow "custody claimants to sue in the courts of almost any state, no matter how fleeting the contact of the child and the family was with the particular state, with little regard to any conflict of law rules."[65] Child custody orders historically have presented a full faith and credit[66] problem because, as the drafters of the UCCJA noted, "the Supreme Court has never settled the question whether the full faith and credit clause of the Constitution applies to custody decrees."[67] States modified other states' orders even when it was clear that other states at least potentially had jurisdiction.[68]

Even assuming full faith and credit applies to custody orders, the second forum need only enforce a judgment to the extent that it would be enforced in the first forum. However, by their very nature, custody orders are non-final.[69] The doctrine of changed circumstances allows a court to modify a custody disposition in response to new circumstances in the child's life.[70] If a party could show changed circumstances, the second court could decide that the

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63. Leonard G. Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 818 (1964). *See* text accompanying *infra* note 134.

64. *See* UCCJA, Table of Jurisdictions, Prefatory Note, paras. 1-6.

65. *Id.* at para. 4.

66. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV. § 1 cl. 1. *See* Note, Ford v. Ford: *Full Faith and Credit to Custody Decrees?*, 73 YALE L.J. 134 (1963).

67. UCCJA, Table of Jurisdictions, Prefatory Note, para. 4.

68. Christopher L. Blakesley, *Child Custody—Jurisdiction and Procedure,* 35 EMORY L.J. 291, 293 (1986).

69. *See* HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 460 (1988).

70. *See id.*

first forum would have modified the order.[71] Again, the law rewarded parties who engaged "seize-and-run" activity and forum shopping.[72]

The Supreme Court has only once considered whether full faith and credit extends to custody decisions. In the 1953 case of *May v. Anderson*,[73] the Court held, in a plurality opinion, that an Ohio court was not required to grant full faith and credit to a Wisconsin decree since Wisconsin did not have personal jurisdiction over the mother.[74] In essence, protection of the parents' rights of due process superseded the child's need for stability. Since personal jurisdiction requires minimum contacts with a forum,[75] as long as a parent avoided minimum contacts with a forum, it could not obtain personal jurisdiction over the parent, and no state of repose in custody could be achieved. In *May v. Anderson*, not only could the mother prevent enforcement of the Wisconsin decree by avoiding contact with Wisconsin, but she could obtain a more favorable order in a state in which she was subject to personal jurisdiction.

Justice Frankfurter concurred[76] in an influential opinion[77] that clarified the scope of the plurality opinion. He noted that, although the Full Faith and Credit Clause did not require Ohio to recognize Wisconsin's decision, Ohio was not *prevented* from doing so by due process considerations, especially since the Ohio Supreme Court had felt that it was bound to do so.[78] Hence, if a state chose to enforce another state's order, the state could do so, but only under principles of comity.[79] Although prevalent before *May*, forum shopping increased dramatically after this decision was handed down.[80] More than one party could be guilty of this strategy: "Even when 'parental kidnapping' was not involved, one or both divorced spouses often moved and sought a different custody order from their new state of residence. The result, seen with depressing frequency, was conflicting custody orders from two states, neither willing to concede the exclusive custody jurisdiction of the other."[81]

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71. *See* New York *ex rel.* Halvey v. Halvey, 330 U.S. 610, 614 (1947) (The rationale for the changed circumstances doctrine is that the child's best interests must be met. If circumstances change, the original decision may no longer further the child's interest. *See* UCCJA, Table of Jurisdictions, Prefatory Note, para. 4.).

72. *See* UCCJA, Table of Jurisdictions, Prefatory Note, para. 6.

73. 345 U.S. 528 (1953).

74. *Id.* at 528-29.

75. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

76. *May*, 345 U.S. at 535-36. Justice Frankfurter's concurrence influenced the drafters of the UCCJA. *See infra* notes 141-42 and accompanying text.

77. *See infra* notes 141-43 and accompanying text.

78. *May*, 345 U.S. at 535-36.

79. *See supra* note 59 for a definition of "comity."

80. Andrea S. Charlow, *Jurisdictional Gerrymandering and the Parental Kidnapping Prevention Act*, 25 FAM. L.Q. NO. 3 299, 303 (1991). *See also* Albert A. Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 358 (1953); Dale F. Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROBS. 819, 828-29 (1944).

81. Michalik v. Michalik, 494 N.W.2d 391, 393 (Wis. 1993) (citation omitted). *See also* State *ex rel.* Valles v. Brown, 639 P.2d 1181, 1184 (N.M. 1984) (The Supreme Court of New Mexico noted the long line of New Mexico cases, which, prior to the PKPA, permitted New Mexico to "modify an out-of-state issued child custody decree based solely on the physical presence of the child and a substantial change of circumstances.").

2. *Parent/Non-Parent Disputes.*—The need to balance a child's best interests against a contestant's legal right to custody is particularly troublesome in cases where one contestant is a parent and one is a non-parent. In these cases, the law presumes that the parent is entitled to custody. However, this presumption is stronger in some forums than others. Combined with varying interpretations of the UCCJA and the PKPA from forum to forum,[82] courts are prone to modify other forums' custody decisions, and adjudicate them under the standard their own forum applies to a parent/non-parent custody dispute.

Dating back to Roman law, fathers were considered to own their children, including the right of life and death over them.[83] However, beginning in the late nineteenth century, the law evolved toward recognition of children's rights, which sometimes stand in contradiction to their parents' rights.[84] The classic example of this conflict is the abused child who is removed from the home by the state. No matter how strong the right of a parent to raise his or her biological children, every jurisdiction today has a legal standard for removal of abused children.[85] In custody disputes between two parents or between two non-parents, the universal standard applied by courts is the "best interests of the child" standard;[86] however, in a dispute between a parent and a non-parent, no consensus exists among states as to what standard to apply. Parent/non-parent cases add a layer of friction to interstate custody decisions. Not only do courts encounter the tension inherent in the UCCJA and the PKPA themselves,[87] but due to the disparate substantive standards of law, a second forum might be determined to reach the merits of the case and decide it differently from the first forum.

a. Rights of family and child.—Any discussion of the rights of family and child requires a definition of "family."[88] The legal definition of "family" continues to evolve, with an increasing emphasis on relational rather than biological links between caregiver and child. United States Supreme Court Justice Rutledge noted in *Prince v. Commonwealth of Massachusetts,*[89] a 1944 case, that the constitutionally-protected sphere of family privacy, which the state cannot enter, includes the right of a biological parent to raise his or her child.[90] Limits on that sphere include the state's right to mandate school attendance and attention to the child's medical needs.[91] In the 1977 case of *Smith v. Organization of Foster*

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82. *See infra* Part II.

83. 2 WILLIAM BLACKSTONE, COMMENTARIES *452. *See generally*, MICHAEL GROSSBERG, GOVERNING THE HEARTH 234-43 (1985) (explaining the shift in the law from paternal property rights in children to standards focusing more on the child's best interests).

84. Suzette M. Haynie, Note, *Biological Parents v. Third Parties: Whose Right to Custody is Constitutionally Protected?*, 20 GA. L. REV. 705, 706-07 (1986).

85. *See* Marjorie R. Freiman, Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 272 (1982).

86. *In re* Marriage of Hruby and Hruby, 748 P.2d 57, 62-63 (Or. 1987) (en banc) ("[I]n custody disputes between natural parents or between parents unrelated to the children, the interests of the children are more nearly the exclusive determinants of the custody determination. This is because the competing custodial rights tend to cancel each other, leaving only the interests of the children as relevant considerations.").

87. *See infra* Part II.

88. *See supra* note 5.

89. 321 U.S. 158 (1944).

90. *Id.* at 165.

91. *Id.* at 165-66.

Families for Equality and Reform,[92] the Court clarified that within the sphere of privacy, "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[93] With that threshold, the Court further analyzed whether a foster family qualified for due process protection. The Court noted that while "family" generally "implies biological relationships . . . biological relationships are not exclusive determination of the existence of a family . . . [and] the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association."[94] The Court indicated that relationship, and not merely biology, creates a family.[95]

The relationship-biology analysis calls into question the existence of a family where a biological link, but no relationship, exists between parent and child. One commentator proposed that recent Supreme Court cases have suggested "that the Constitution protects the actual family relationship rather than the biological relationship."[96] In the 1978 *Quilloin v. Walcott* decision,[97] the natural father of a child born out of wedlock had never attempted to acknowledge the child legally as his own, had maintained only an irregular relationship with the child, and had born very little responsibility for the child's upbringing. The Court held that adoption of the child by his stepfather over the biological father's objections did not violate the biological father's due process rights, especially since an existing family unit would thereby be fully recognized.[98] The Court allowed the best interests of the child—determined at the trial level as adoption by the stepfather—to supersede the natural father's rights.[99]

Using a similar line of reasoning, the Court found in the 1983 case of *Lehr v. Robertson*[100] that since the father of a child born out of wedlock had never formed a "substantial relationship" with his daughter, his due process rights were not violated when the state failed to notify him of his daughter's adoption.[101] Although the state knew the father's whereabouts, he had failed to protect his legal right to notice of the adoption by registering with the putative father registry. By contrast, in *Caban v. Mohammed*,[102] a 1979 case, both unwed parents made substantial attempts to support and rear the children. The Court upheld the parents' constitutional rights to raise a family.[103] These cases reveal that biological links between parent and child are not necessarily enough to create a family. The

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92. 431 U.S. 816 (1977).

93. *Id.* at 842 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)).

94. *Id.* at 843-44.

95. *Id.* at 844. The Court ultimately held that foster family relationships are entitled to only a very limited due process protection since they derive solely from statute. *Id.* at 846.

96. Haynie, *supra* note 84, at 706.

97. 434 U.S. 246 (1978).

98. *Id.* at 255.

99. *Id.*

100. 463 U.S. 248 (1983).

101. *Id.* at 266-67.

102. 441 U.S. 380 (1979).

103. *Id.* at 394.

parents must also acknowledge the existence of family. In fact, "[t]he rights to conceive and to raise one's children have been deemed 'essential.'"[104]

The rights of children are likewise protected under the Constitution. For example, the Supreme Court has held that children have constitutional rights under the First Amendment,[105] a property right in education protected by the Due Process Clause,[106] rights under the Fourteenth Amendment and Bill of Rights to counsel, confrontation, and cross-examination of witnesses,[107] and the right to have a crime of which they are accused proven beyond a reasonable doubt.[108] Moreover, the Third Circuit has stated that "[t]he existence of a 'best interests of the child' standard, often used in domestic custody disputes, is a further recognition that minors have interests and constitutional rights separate from those of the parents."[109] The differences from state to state between standards governing parent/non-parent custody disputes hinge on policy choices made by state law as to which set of rights is more heavily weighted—parents' or children's.[110]

b. Standing to sue.—The question of standing depends on whether the party has alleged a sufficient personal stake in the outcome of the controversy.[111] It has been said that a "non-parent who has a significant connection with the child had standing to assert a claim for custody."[112] Under the UCCJA and the PKPA, a "contestant" to an interstate custody action is defined very simply as a person who claims a right to physical custody or visitation, with no requirement that the contestant claim under color of law.[113] The *DeBoer* dissent contended that the DeBoers did have standing to sue, pointing out the language of the PKPA and the UCCJA that a party must have had custody of a child in the past and that the Iowa decision contrary to the DeBoers' wishes did not automatically strip them of their right to sue for custody.[114] However, the Supreme Court of Michigan affirmed the Court of Appeals'

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104. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See also* Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925).

105. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969).

106. Goss v. Lopez, 419 U.S. 565, 573-74 (1975).

107. *In re* Gault, 387 U.S. 1, 29-31 (1967).

108. *In re* Winship, 397 U.S. 358, 368 (1970).

109. Lehman v. Lycoming County Children's Servs. Agency, 648 F.2d 135, 153 (3d Cir. 1981), *aff'd,* 458 U.S. 502 (1982).

110. *See infra* subpart I.B.2.c. for a discussion of these standards and the policies behind them.

111. Flast v. Cohen, 392 U.S. 83, 99 (1968) (citations omitted). A recent Wisconsin case stated that a third party has standing to seek custody of a child if two conditions are met: "[F]irst, an 'underlying action affecting the family unit has been previously filed'; and second, the child's family is nonintact, so that it may be in the child's best interests to order visitation 'to mitigate the trauma and impact of [the] dissolving family relationship.'" *In re* Marriage of Cox v. Williams, 502 N.W.2d 128, 130 (Wis. 1993) (quoting WIS. STAT. ANN. § 767.245 (West 1988)).

112. Buness v. Gillen, 781 P.2d 985, 988 (Alaska 1989) (stepfather who had voluntarily paid child support had standing to sue for custody). *Accord* J. ATKINSON, MODERN CHILD CUSTODY PRACTICE § 8.04 at 413 (1986) ("Most states, by statute or case law, allow a nonparent standing to assert a claim for custody, at least if the nonparent has significant connections with the child."); *see* CLARK, *supra* note 69, § 19.6 at 820-21.

113. *See infra* note 145.

114. DeBoer v. Schmidt, 502 N.W.2d 649, 684 (Mich. 1993), *stay denied sub nom.* DeBoer v. DeBoer, 114 S.Ct. 1 (1993), *stay denied,* 114 S.Ct. 11 (1993).

holding that the DeBoers lacked standing to sue because they had been stripped of any legally-protected interest before they filed the Michigan petition.[115]

Non-parents who wish to sue for custody of a child acquire standing to do so where they have played at least a quasi-parental role with the child in the past. The following types of persons fill a parental role:[116]

(i) Psychological parents.—One expert has asserted that "[o]nly a parent who provides for these [daily emotional, physical and psychological] needs will build a psychological relationship to the child on the basis of the biological one and will become his 'psychological parent' in whose care the child can feel valued and 'wanted.' An absent biological parent will remain, or tend to become, a stranger."[117] In *Hoy v. Willis*, a 1978 case from the Appellate Division of the New Jersey Superior Court, a child's foster mother (who was also the child's aunt), with whom the biological mother had voluntarily placed the child for two years, had standing to sue for custody as the child's psychological parent.[118] An expert testifying during the case replied affirmatively when asked this question:

> If a couple kidnapped an infant, kept it for four years and within that four years they became the psychological parents of the child and if both the parents and the kidnappers were equal in all respects would it be in the best interests of the child to continue custody with the kidnappers?[119]

The bond between psychological parents and children has been protected by courts: "[D]isruption of this relationship can be even more traumatic and devastating on occasion than severing the tie with the natural parent."[120] Removal from the psychological parents has even been found to suggest a showing of clear detriment.[121] Standing in stark contrast to the proposition that children are the property of their parents, the doctrine has been invoked to support placement of a child with his or her psychological parents rather than his or her biological parents.

(ii) Equitable parents.—A Michigan court invoked this doctrine to allow a man, who was married to the biological mother and had always maintained a father-son relationship with her son, to adopt him.[122] The man wanted to maintain the rights and obligations of fatherhood.[123]

(iii) Functional parenthood.—Functional parenthood arises where the relationship is legally created with the intention that it be a parent-child relationship, such as the foster

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115. Matter of Clausen, 501 N.W.2d 193, 197 (Mich. Ct. App. 1993), *aff'd sub nom.* DeBoer v. Schmidt, 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom.* DeBoer v. DeBoer, 114 S.Ct. 1 (1993), *stay denied*, 114 S.Ct. 11 (1993).

116. *See* Sheila McKeown, *Traditional Custody Decisions vs. Modern Nonparental Challenges*, 13 J. JUV. L. 42 (1992).

117. GOLDSTEIN ET AL., *supra* note 2, at 17.

118. 398 A.2d 109.

119. *Id.* at 111-12.

120. Doe v. Doe, 399 N.Y.S.2d 977, 982 (N.Y. Sup. Ct. 1977).

121. Buness v. Gillen, 781 P.2d 985, 989 n.8 (Alaska 1989). *See also* Sorentino v. Family & Children's Soc. of Elizabeth, 367 A.2d 1168, 1171 (N.J. 1976).

122. Atkinson v. Atkinson, 408 N.W.2d 516 (Mich. Ct. App. 1987), *appeal denied*, 492 Mich. 884 (1987).

123. *Id.*

parent relationship. In the 1974 case *In Re B.G.*,[124] the California Supreme Court recognized that foster parents have standing to sue for custody.[125]

(iv) Domestic partnerships.—In domestic partnerships, two unmarried persons enjoy a marriage-like relationship. So far, however, co-parenting agreements drawn between them have not been generally recognized.[126]

c. Parental rights vs. best interests of child.—Parent/non-parent cases can be very difficult for courts because the parents' wishes or rights may be contrary to the child's best interests. Factors courts have considered in determining which claimant will prevail include: the length of time (if any) the child has been in the care of the nonparent; the child's wishes; the child's relationship with other family members; the number of siblings in either household; the child's involvement in school and community; and, the health of all persons concerned.[127]

Courts historically have taken one of three positions in response to parent/non-parent custody disputes. Eight jurisdictions apply a parental rights standard, holding that unless proven unfit by clear and convincing evidence, the biological parent is entitled to custody of the child as against any nonparent custodian.[128] Twenty-seven jurisdictions apply presumptions in favor of the biological parent but the burden on the nonparent is not as great as under the parental rights standard.[129] Finally, twelve jurisdictions simply apply a best

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124. 523 P.2d 244 (Cal. 1974).

125. *Id.* at 254.

126. *See, e.g.*, *In re* K.Z.H., 471 N.W.2d 202 (Wis. 1991) (The court held that a single woman had no standing to sue for custody of the minor son of her former partner of eight years under the doctrines of equitable parent and *de facto* parent nor under a co-parenting agreement she and her partner had signed.). *See also* Nancy S. v. Michele G., 228 Cal.App.3d 831 (1991) (A former domestic partner was entitled to visitation only upon the biological mother's consent.); A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992) (co-parenting agreement held unenforceable due to procedural errors in the case).

127. *See* KAN. STAT. ANN. § 60-1610(b)(2) (1983).

128. *See* Buness v. Gillen, 781 P.2d 985 (Alaska 1989); *In re* D.A. McW., 460 So. 2d 368 (Fla. 1984); Blackburn v. Blackburn, 292 S.E.2d 821 (Ga. 1982); McGregor v. Phillips, 537 P.2d 59 (Idaho 1975); *In re* Guardianship of Williams, 869 P.2d 661 (Kan. 1994); Stoker v. Huggins, 471 So. 2d 1228 (Miss. 1985): Pierce v. Pierce, 645 P.2d 1353 (Mont. 1982); Grover v. Phillips, 681 P.2d 81 (Okla. 1984).

129. *See Ex Parte* Mathews, 428 So. 2d 58 (Ala. 1983); Bryan v. Bryan, 645 P.2d 1267 (Ariz. Ct. App. 1982); Perkins v. Perkins, 589 S.W.2d 588 (Ark. Ct. App. 1979), *petition denied*, 589 S.W.2d 29 (Ark. 1979); *In re* Angelica M., 170 Cal.App.3d 210 (1985); *In re* Estate of Becton, 474 N.E.2d 1318 (Ill. App. Ct. 1985); Hendrickson v. Binckley, 316 N.E.2d 376 (Ind. Ct. App. 1974), *cert. denied*, 423 U.S. 868 (1975); McNames v. Corum, 683 S.W.2d 246 (Ky. 1984); Boyett v. Boyett, 448 So. 2d 819 (La. Ct. App. 1984); Ross v. Hoffman, 372 A.2d 582 (Md. 1977); Freeman v. Chaplic, 446 N.E.2d 1369 (Mass. 1983); Zuziak v. Zuziak, 426 N.W.2d 761 (Mich. Ct. App. 1988); Westphal v. Westphal, 457 N.W.2d 226 (Minn. Ct. App. 1990); *In re* K.K.M., 647 S.W.2d 886 (Mo. Ct. App. 1983); Nye v. Nye, 329 N.W.2d 346 (Neb. 1983); Fisher v. Fisher, 670 P.2d 572 (Nev. 1983); *In re* D.T., 491 A.2d 7 (N.J. Super. Ct. App. Div. 1985); Brito v. Brito, 794 P.2d 1205 (N.M. Ct. App. 1990); Merritt v. Way, 446 N.E.2d 776 (N.Y. 1983); Plemmons v. Stiles, 309 S.E.2d 504 (N.C. Ct. App. 1983); *In re* Perales, 369 N.E.2d 1047 (Ohio 1977); *In re* Marriage of Hruby and Hruby, 748 P.2d 57 (Or. 1987) (en banc); Ferencak v. Moore, 445 A.2d 1282 (Pa. Super. Ct. 1982); Mayer v. Mayer, 397 N.W.2d 638 (S.D. 1986); Bonwich v. Bonwich, 699 P.2d 760 (Utah 1985), *cert. denied*, 474 U.S. 848 (1985); Patrick v. Byerley, 325 S.E.2d 99 (Va. 1985); *In re* Marriage of Allen, 626 P.2d 16 (Wash. Ct. App. 1981); Barstad v. Frazier, 348

interests standard factoring in the parent's right to custody in balancing all the interests affecting the child.[130] The standard a jurisdiction adopts reflects a policy choice about how much to protect the parent's rights to raise their biological children versus how much to promote the child's best interest if the court finds that the child's best interests conflict with the parents' rights.

(i) Parental rights.—The parental rights theory, the traditional view of the law toward parent-child rights, has been justified by the following rationale:

> Putting the matter in another way, it is quite correct to say that the welfare of children is always a matter of paramount concern, but the policy of the state proceeds on the theory that their welfare can best be attained by leaving them in the custody of their parents and seeing to it that the parents' right thereto is not infringed upon or denied. . . . And no court should construe its intrusive jurisdiction as extending to cases where parents have done nothing offensive to law, morals, or good conduct, which would forfeit their paramount natural right of parenthood, which is to have the custody of their own children.[131]

The value of the parental rights doctrine is that it provides certainty in the law. The presumption in favor of parents is so strong that non-parents are discouraged from suing for custody because courts will almost always decide in favor of the biological parents.

However, the rigidity of the strict parental rights standard has been criticized for exhibiting a startling lack of concern for the interests of the children.[132] Even if the child has spent a substantial amount of time with a non-parent custodian and has significantly bonded with that individual, courts applying this standard will return the child to the natural parent, causing disruption to the child, unless the nonparent can prove the biological parent unfit by clear and convincing evidence. One commentator noted that this standard is "based on an almost mystical belief in the superiority of biological parents."[133]

(ii) Best interests of the child.—Whereas the parental rights jurisdictions heavily weight the legal right of a parent to raise their child, courts applying the best interests standard are

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N.W.2d 479 (Wis. 1984).

130. *See* HAWAII REV. STAT. § 571-46(2) (1976); *In re* C.C.R.S., 872 P.2d 1337 (Colo. Ct. App. 1993), *cert. granted* (May 9, 1994); McGaffin v. Roberts, 479 A.2d 176 (Conn. 1984), *cert. denied*, 470 U.S. 1050 (1985); D. v. Z., 414 A.2d 211 (Del. Super. Ct. 1980); *In re* Marriage of Reschly, 334 N.W.2d 720 (Iowa 1983); Costigan v. Costigan, 418 A.2d 1144 (Me. 1980); Stanley D. v. Deborah D., 467 A.2d 249 (N.H. 1983); Patzer v. Glaser, 368 N.W.2d 561 (N.D. 1985); Cook v. Cobb, 245 S.E.2d 612 (S.C. 1978); Yancey v. Koonce, 645 S.W.2d 861 (Tex. Ct. App. 1983); Florida, Dep't of Health and Rehab. Servs. *ex rel.* State Dep't of Human Servs. v. Thornton, 396 S.E.2d 475 (W. Va. 1990); Elm v. Key, 480 P.2d 104 (Wyo. 1971).

131. *In re* Kailer, 255 P. 41, 42 (Kan. 1927).

132. "Courts adhering to the parental-right doctrine are also ignoring the contemporary psychological research holding that psychological, not biological, ties are the ones that bind a child to an adult." Michael B. Thompson, *Child-Custody Disputes Between Parents and Non-Parents: A Plan for the Abrogation of the Parental-Right Doctrine in South Dakota*, 34 S.D. L. REV. 534, 572 (1989).

133. Sandra R. Blair, *Jurisdiction, Standing, and Decisional Standards in Parent/Non-Parent Custody Disputes, In re* Marriage of Allen, 28 Wn.App. 637, 626 P.2d 16 (1981), 58 WASH. L. REV. 115-16 (1982). *See* Behn v. Timmons, 345 So. 2d 388, 389 (Fla. Dist. Ct. App. 1977) (A biological parent has "a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring.").

willing to consider the child's rights over the parents'. In a pure best interests jurisdiction, courts weigh all the factors affecting a child's custody disposition, including the legal rights of other parties, and decide what is best for the child in that particular case. To be sure, it is a highly indeterminate, fact-sensitive standard.

The benefit of considering the child's best interests above all is that the law thereby allows enough flexibility to decide each case individually. Justice McFarland of the Kansas Supreme Court has noted that:

> As a former district court judge I can certainly recall instances where this statute [abolishing parental preference] would have been highly desirable. The parent . . . may leave a child with relatives for many years, then suddenly want it back in a fit of guilt or due to changed circumstances. The relatives may well be the only home the child has known and a strong family unit has been created. The trial court should have the discretion to preserve the family unit as it now exists.[134]

Mental health professionals agree that the child suffers detriment when removed from the home where he or she has bonded, unless there are extreme circumstances.[135] One case explained that "bonds of love between parent and child are not dependent upon blood relation and instinct, but may be forged as strongly in the crucible of day to day living."[136]

The advantages of the best interests standard are offset by the criticism of the standard: that it is too flexible. Giving courts *carte blanche* to remove children under such a vague standard gives the state too much power to intrude in the family unit. Moreover, professionals in the juvenile field who assess a family's needs are not invincible in making their judgments.

Because the strict parental rights standard is criticized as too rigid, and the best interests standard as too flexible, most courts fall somewhere between the two standards.[137] In these jurisdictions, parental and children's rights are more evenly balanced than in states that follow one of the polar standards. The presumption in favor of biological parents can be overcome by less than a clear and convincing showing of parental unfitness.

II. The Current Solution to Jurisdictional Uncertainty

A. The UCCJA[138]

Adopted at the 1968 National Conference of Commissioners on Uniform State Laws, the UCCJA was intended to "bring some semblance of order into the existing [jurisdictional] chaos."[139] The problems in rendering child custody decisions showed the need for a uniform

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134. Sheppard v. Sheppard, 630 P.2d 1121, 1129 (Kan. 1981) (McFarland, J., dissenting), *cert. denied*, 455 U.S. 919 (1982).

135. *See* Blakesley, *supra* note 68, at 378; Goldstein, et al., *supra* note 2, at 113-33; Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 Ohio State L.J. 455, 488-90 (1984); Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 Yale L.J. 757, 789-92 (1985).

136. Borsdorf v. Mills, 275 So. 2d 338, 340 (Ala. Civ. App. 1973).

137. *See supra* note 129 and accompanying text.

138. *See supra* note 11 for citations to the UCCJA in all fifty jurisdictions.

139. UCCJA, Table of Jurisdictions, Prefatory Note, para. 8. The UCCJA provides:

SECTION 1. [*Purposes of Act; Construction of Provisions*]

body of law.[140] Although the states would continue to be sovereign, the hope was that, with uniform laws, the outcome in interstate child custody cases would be more certain. By 1984, it was enacted in all fifty states with only minor differences among the different versions.[141] It was influenced by Justice Frankfurter's concurrence in *May*[142] in that it permits one state to enforce another state's custody order even if one claimant was not subject to personal jurisdiction in the rendering state, as long as the claimant received notice and an opportunity

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(a) The general purposes of this Act are to:

(1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

(3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

(4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;

(7) facilitate the enforcement of custody decrees of other states;

(8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

(9) make uniform the law of those states which enact it.

(b) This Act shall be construed to promote the general purposes stated in this section.

See generally, UCCJA, Publisher's Explanation:

The National Conference of Commissioners on Uniform State Laws is composed of Commissioners from each of the states, the District of Columbia, and Puerto Rico. In thirty-three of these jurisdictions the Commissioners are appointed by the chief executive acting under express legislative authority. In the other jurisdictions the appointments are made by general executive authority. There are usually three representatives from each jurisdiction . . . . The object of the National Conference, as stated in its constitution, is 'to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable'. The National Conference works through standing and special committees . . . . If the National Conference decides to take up the subject, it refers the same to a special committee with instructions to report a draft of an act . . . . When finally approved by the National Conference, the uniform acts are recommended for general adoption throughout the jurisdiction of the United States and are submitted to the American Bar Association for its approval.

140. UCCJA, Table of Jurisdictions, Prefatory Note.

141. *See supra* note 11 for citations to the UCCJA in all fifty jurisdictions.

142. May v. Anderson, 345 U.S. 528 (1953); *see supra* notes 77-79 and accompanying text.

to be heard.[143] The drafters noted that the Act would not reach its intended results unless a large number of jurisdictions adopted it.[144]

The substantive provisions of the Act attempt to provide certainty or repose in the law of jurisdiction governing custody determinations, while leaving some flexibility to decide each case individually. Under the Act, there are four ways in which a forum can obtain jurisdiction to decide a case: 1) the forum state was the home state of the child at the time of the commencement of the proceeding; 2) the child and at least one person claiming a right to custody have a "significant connection" with the forum state and there is a substantial amount of evidence in the forum state relating to the child's welfare; 3) the child is present in the state and emergency conditions, such as abandonment or threat of injury, require the court to take jurisdiction; or, 4) no other state has jurisdiction or another state has declined jurisdiction because the forum can more appropriately exercise jurisdiction.[145]

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143. The UCCJA provides:

SECTION 4 [*Notice and Opportunity to be Heard*]

Before making a decree under this Act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this State, notice and opportunity to be heard shall be given pursuant to section 5.

[Section 5 sets forth guidelines for how notice is to be made.]

See Wayne Everett Waite, Note, *Child Custody: Substantial Justice Toward Children or Procedural for Parents?*—Pasqualone v. Pasqualone, 63 Ohio St.2d 96, 406 N.E.2d 1121 (1980), 7 U. DAYTON L. REV. 217, 225; UCCJA § 13, Commissioner's Note. *See also* Goldfarb v. Goldfarb, 268 S.E.2d 648, 651 (Ga. 1980); Pratt v. Pratt, 431 A.2d 405, 409-10 (R.I. 1981); Hudson v. Hudson, 670 P.2d 287, 293-95 (Wash. Ct. App. 1983) (cases holding that the UCCJA does not violate a party's right to due process even though one party lacked minimum contacts with the forum that adjudicated the child's custody).

144. UCCJA, Table of Jurisdictions, Prefatory Note, para. 11.

145. The UCCJA provides:

SECTION 2 [*Definitions*] As used in this Act:

(1) "contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child;

(2) "custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person;

(3) "custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect and dependency proceedings;

(4) "decree" or "custody decree" means a custody determination contained in a judicial decree or other order made in a custody proceeding, and includes an initial decree and a modification decree;

(5) "home state" means the state in which the child immediately preceding the time involved lived with his parents, parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period;

(6) "initial decree" means the first custody decree concerning a particular child;

If, at the time the petition is filed, a proceeding is pending in another forum that is "substantially in conformity" with the UCCJA, the court may not exercise jurisdiction.[146] Under the broad definition of "custody determination" given in the UCCJA, the Act is now generally held to apply to almost all interstate custody determinations, including, for

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(7) "modification decree" means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court;

(8) "physical custody" means actual possession and control of a child;

(9) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody; and

(10) "state" means any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia.

SECTION 3 [*Jurisdiction*]

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]; or

(4) (i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

146. The UCCJA provides:

SECTION 6 [*Simultaneous Proceedings in Other States*]

(a) A court of this State shall not exercise its jurisdiction under this Act if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction *substantially in conformity* with this Act, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

(Emphasis added).

example, guardianships[147] and adoption proceedings,[148] which are not expressly named in the Act.[149] Although section three (which gives the four bases of jurisdiction) intended that jurisdiction exist "only if it is in the *child's* interest,"[150] the drafters further stated that the section "was phrased in general terms in order to be flexible enough to cover many fact situations too diverse to lend themselves to exact description. But its purpose is to limit jurisdiction rather than to proliferate it."[151]

The two most significant bases of jurisdiction are the "home state" test and the "significant connection" test, although the language does not state that either alternative is preferred.[152] But, since the Act was intended to reduce jurisdictional confusion, there is a "strong presumption that the decree state will continue to have modification jurisdiction until it loses all or almost all connection with the child."[153] Once the court has properly exercised jurisdiction under the Act, if a party seeks to modify that decision in another forum, the second forum must refer to section fourteen of the Act which governs modification of prior decrees. A second forum may modify a previous decision from another forum if it finds that: 1) the first forum no longer has jurisdiction under principles of the Act or has declined to exercise jurisdiction; and, 2) the second forum does have jurisdiction.[154]

In deciding whether or not to exercise jurisdiction under the UCCJA, courts use a three-step analysis. First, does the first court no longer have jurisdiction (Did the first court never properly have it? Has the first court declined to exercise jurisdiction? Does the first court no longer have jurisdiction for another reason?)? Second, if the first court no longer has

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147. *See* Guardianship of Donaldson, 223 Cal. Rptr. 707, 712-13 (Cal. Ct. App. 1986).

148. Gainey v. Olivo, 373 S.E.2d 4, 6 (Ga. 1988).

149. The UCCJA provides:

SECTION 2 [Definitions] As used in this Act:

(2) "custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights. It does not include a decision relating to child support or any other monetary obligation of any person;

(3) "custody proceeding" includes proceedings in which a custody determination is one of several issues, *such as an action for divorce or separation, and includes child neglect and dependency proceedings;*

(Emphasis added).

150. UCCJA, § 3, Official Cmt. (emphasis in original).

151. *Id.*

152. *See supra* note 145.

153. Adoption of Zachariah K., 8 Cal. Rptr.2d 423, 429 (Cal. Ct. App. 1992).

154. The UCCJA provides:

SECTION 14 [*Modification of Custody Decree of Another State*]

(a) If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.

(b) If a court of this State is authorized under subsection (a) and section 8 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 22.

[Section 22 of the UCCJA is titled "Request for Court Records of Another State."]

jurisdiction, does the forum state have jurisdiction? Finally, *should* the forum state exercise jurisdiction? In the last step, the court considers the "clean hands doctrine"[155] and forum non conveniens.[156] This step of the analysis involves weighing the child's best interests against the forum state's interest in deterring forum shopping and kidnapping. "Jurisdiction shall not be declined unless the trial court determines that the child's best interests will not be injured by such a decision."[157]

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155. The UCCJA provides:

SECTION 8 [*Jurisdiction Declined by Reason of Conduct*]

(a) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction if this is just an proper under the circumstances.

(b) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(c) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses.

See UCCJA § 8, Official Cmt. ("This section incorporates the'clean hands doctrine.'").

156. The UCCJA provides:

SECTION 7. [*Inconvenient Forum*]

(a) A court which has jurisdiction under this Act to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

. . . .

(c) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(1) if another state is or recently was the child's home state;

(2) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(3) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(4) if the parties have agreed on another forum;

(5) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in section 1.

See also Willoughby v. Willoughby, 525 N.Y.S.2d 46 (N.Y. App. Div. 1988) (New York declined, in the best interests of the children, to take jurisdiction even though Indiana, the state of original jurisdiction, no longer had jurisdiction because Florida had the most significant connection to the children in that they lived and attended school there.).

157. Pierce v. Pierce, 640 P.2d 899, 905-06 (Mont. 1982).

In order to deter lawless childsnatching, courts are instructed to exercise their powers of equity. If one party's conduct is so objectionable that the court, in its "inherent equity powers cannot in good conscience permit that party access to its jurisdiction," the court can decline jurisdiction.[158] Sometimes, however, even the policy against deterring lawless childsnatching is outweighed by considerations of the child's best interests. In *Van Houten v. Van Houten*,[159] a 1989 case from the Appellate Division of the New York Supreme Court, the father ignored a Florida divorce decree granting custody to the mother and absconded with the child. The father and child were located in New York eight years later. The mother sought to enforce the Florida order, but the court found that the Florida decree was not entitled to full faith and credit, even though Florida had originally exercised jurisdiction properly.[160] The court said that the case was "one of those rare instances" where the best interests of the child must prevail over other individuals' legal rights.[161]

The intention of the Act was that custody be decided in the forum that could most appropriately litigate the best interests of the child.[162] Professor Bodenheimer, the Reporter for the Special Committee that drafted the Act, has written that the Act was not intended to create concurrent jurisdiction between two states:

> When a child stays in a state for six months or more as a visitor or a victim of abduction, the question arises whether the new state has power to modify the custody decree. The answer is that the Act does not permit the second state to take jurisdiction because the paramount jurisdiction of the prior state continues. Section 3 of the Act, the basic provision on subject matter jurisdiction, must be read in conjunction with section 14, which does not permit modifications by another state as long as the prior state's exclusive jurisdiction continues. This is true whether or not another state has technically become the child's home state.[163]

The narrower a court interprets the provision on continuing jurisdiction, the more likely the court will find itself able to modify a sister state's order. In *E.E.B. v. D.A.*, the Supreme Court of New Jersey found that Ohio's refusal to exercise jurisdiction on best interests entitled New Jersey to do so. But in *DeBoer*, even though Iowa had not decided best interests, Michigan found that the Iowa order had to be enforced.[164] This discrepancy reveals the fact that various jurisdictions interpret the UCCJA differently, making it impossible to predict whether a custody order will be given full faith and credit uniformly throughout the country.

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158. UCCJA, § 8, Official Cmt.

159. 549 N.Y.S.2d 452.

160. *Id.* at 454.

161. *Id.*

162. *See* McAtee v. McAtee, 323 S.E.2d 611, 615 (W. Va. 1984); Brigitte Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1221 (1969).

163. Brigitte Bodenheimer, *Progress under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CAL. L. REV. 978, 988 (1977). *See supra* notes 145-46.

164. *See supra* notes 34-35, 46-48 and accompanying text.

B. The PKPA[165]

"When the UCCJA proved an imperfect remedy for the staggering national problem of child-snatching and forum shopping in interstate child custody disputes, Congress enacted the PKPA to provide a uniform federal standard to ascertain the one state with jurisdiction to modify an existing child custody order."[166] Congress adopted the PKPA, which is very similar to the UCCJA, as a gap-filler for states that did not adopt a version of the UCCJA.[167] For example, New Mexico had not adopted the UCCJA in 1980 and had a long line of cases rewarding seize-and-run behavior. The PKPA ended that line of cases by setting guidelines for states to grant full faith and credit to custody orders of other jurisdictions.[168] Although the PKPA was enacted to further the same goals and policies as the UCCJA, there are two differences between them. First, whereas the UCCJA provides a forum with jurisdiction to decide a case, the PKPA only addresses whether another state's order is entitled to full faith and credit. Second, the language of the PKPA is precise in areas where the UCCJA is vague.

In 1988, the United States Supreme Court noted in *Thompson v. Thompson*[169] that Congress intended the PKPA as an addendum to the Full Faith and Credit Clause of the Constitution.[170] The Court concluded that the PKPA confers no cause of action in the federal courts for a claimant to request that the court determine which of two conflicting orders is valid.[171] However, the Court made the qualification that "ultimate review remains available in this Court for truly intractable jurisdictional deadlocks."[172]

The PKPA is, nonetheless, a federal law, which preempts state law under the Supremacy Clause of the Constitution of the United States where state law conflicts.[173] As the

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165. 28 U.S.C. § 1738A (1980).

166. Murphy v. Woerner, 748 P.2d 749, 750 (Alaska 1988).

167. "The PKPA, drafted after the UCCJA, is directed to the same child custody problems, and provisions of both statutes are nearly identical." Adoption of Zachariah K., 8 Cal. Rptr.2d 423, 428 (Cal. Ct. App. 1992). *But see In re* A.L.H., 630 A.2d 1288, 1291 n.2 (Vt. 1993) ("The courts are divided on whether the PKPA applies to neglect and dependency proceedings."). When the PKPA was adopted, 43 states had adopted a version of the UCCJA. *See* P. HOFF, LEGAL REMEDIES IN PARENTAL KIDNAPPING CASES: A COLLECTION OF MATERIALS 8 (5th ed. 1986).

168. State *ex rel.* Valles v. Brown, 639 P.2d 1181, 1184 (N.M. 1981).

169. 484 U.S. 174 (1988).

170. *Id.* at 183. U.S. CONST., art. IV, § 1; *see supra* subpart I.B.1.

171. *Thompson*, 484 U.S. at 182-84. Before this case, there was a circuit court split as to whether a federal court was permitted to enforce the PKPA. For support of the argument that federal courts should be allowed to do so, see Ann T. Wilson, *The Parental Kidnapping Prevention Act: Is There an Enforcement Role for the Federal Courts?*, 62 WASH. L. REV. 841 (1987).

172. *Thompson*, 484 U.S. at 187. However, the court has not yet decided such a case.

173. Murphy v. Woerner, 748 P.2d 749, 750 (Alaska 1988); Garrett v. Garrett, 732 S.W.2d 127, 128 (Ark. 1987); Archambault v. Archambault, 555 N.E.2d 201, 204-05 (Mass. 1990); Shute v. Shute, 607 A.2d 890, 893 (Vt. 1992); Michalik v. Michalik, 494 N.W.2d 391, 394 (Wis. 1993). *See also* U.S. CONST., art. VI, cl. 2, which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing

Massachusetts Supreme Court pointed out, however, preemption occurs only where the state law does "major damage" to "clear and substantial" federal interests.[174] Thus, a federal court must defer to state family law unless Congress has clearly indicated a contrary intention.[175] One way for states to avoid preemption is to construe their state laws in accordance with federal law.[176] Since the UCCJA and the PKPA are so similar, a court deciding whether to grant full faith and credit to another forum's order under the PKPA would use an analysis much like the one provided in the UCCJA.[177]

However, in two places the PKPA is more precise than the UCCJA. First, the UCCJA does not prioritize the different types of jurisdiction. Although the Official Comment notes a strong presumption in favor of "home state" jurisdiction, the language of the statute itself does not expressly state that preference.[178] By contrast, the PKPA provides that if home state jurisdiction exists, then only the home state forum's orders are entitled to full faith and credit (unless the court is responding to an emergency situation).[179] Secondly, whereas the PKPA

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in the Constitution or Laws of any State to the Contrary notwithstanding.

174. *Archambault*, 555 N.E.2d at 205 (citations omitted).

175. *Id.*

176. *See* Kumar v. Superior Court, 652 P.2d 1003, 1011 (Cal. 1982) ("[F]ederal legislation would compel the result we reach in the instant case."); *In re* Marriage of Leyda, 398 N.W.2d 815, 820 (Iowa 1987) ("Both the UCCJA and the Federal Parental Kidnapping Prevention Act of 1980 lead to the conclusion that Michael's rights under the Iowa decree are unaffected by the order of the Florida court."); State *ex rel.* D.S.K., 792 P.2d 118, 128 (Utah Ct. App. 1990) ("In this case, we reach the same resolution under the UCCJA as we would under the PKPA.").

177. *See supra* subpart II.A.

178. *See supra* notes 145-46 and accompanying text.

179. Subsection (c) of the PKPA states:

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if—

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant for other reasons, and a contestant continues to live in such State;

(B) (i) *it appears that no other State would have jurisdiction under subparagraph (A)*, and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that

gives an express standard for continuing jurisdiction, the UCCJA does not. The PKPA says that if the forum made the custody order consistently with the provisions of its own state law (the forum's version of the UCCJA), and the forum continues to be the residence of the child or any contestant,[180] then the forum has exclusive jurisdiction.[181] In these two areas, the PKPA provides more certainty than the UCCJA. Two primary ways under the PKPA to attack a prior custody order rendered in another state arise from the language of subsection (d).[182] The party would argue that either the first party failed to exercise jurisdiction properly under its own state laws or that the first forum is no longer the residence of the child nor a contestant.

Since the UCCJA and the PKPA are jurisdictional statutes only, they do not impose substantive principles of law on states, and the states have different substantive standards of law in parent/non-parent cases. If both parents are biological parents (or both are non-parents), the universal standard is that of the child's best interests.[183] But where one contestant is a non-parent, state standards differ.[184] The difference between the three cases noted in subpart I.A. of this Note—*DeBoer,*[185] *E.E.B.*,[186] and *Lemley*[187]—is the strictness with which they construe the Acts in deciding whether to grant full faith and credit to a sister state's custody order. They present an issue that merges state substantive law with these jurisdictional statutes: If the first court does not adjudicate the child's best interests, do the jurisdictional statutes allow another forum to do so if the merits of the case indicate that a best interests determination is in order?

> the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that the court assume jurisdiction; or
>
> (E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(Emphasis added). *Compare* UCCJA § 3 (text given in *supra* note 145) and §14 (the relevant portion of which is given in *supra* note 154).

180. The PKPA defines a contestant as "a person, including a parent, who claims a right to custody or visitation of a child." 28 U.S.C. § 1738(b)(2).

181. Subsection (d) of the PKPA states:

> (d) The jurisdiction of the court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

[For the text of subsection (c)(1), *see supra* note 179]. *See, e.g.*, McBride v. Sokol, 469 So. 2d 645 (Ala. Civ. App. 1985); Clark v. Boreanaz, 552 N.Y.S.2d 760 (N.Y. App. Div. 1990).

182. For the text of subsection (d), see *supra* note 181.

183. *See supra* note 86 and accompanying text.

184. *See supra* subpart I.B.2.c.

185. *See supra* notes 17-42 and accompanying text.

186. *See supra* notes 42-48 and accompanying text.

187. *See supra* notes 42, 49-54 and accompanying text.

III. The Proposed Solution to Jurisdictional Competition

A. Inadequacy of the Current Solution

Described as "schizophrenic legislation," the UCCJA and the PKPA attempt to provide both flexibility and certainty in custody decisions.[188] Disputes involving non-parents lead to a greater degree of jurisdictional uncertainty given the diverse standards of law from forum to forum in parent/non-parent disputes.[189]

In order to bring more certainty into the jurisdictional problem, one commentator has recommended that every jurisdiction adopt a Revised UCCJA.[190] She proposes that one decree court have exclusive power to modify its decision for anywhere up to five years. At that point, only if that state remains the child's home state may the court continue jurisdiction. If not, the child's new home state gains exclusive jurisdiction. The one exception would be genuine emergency situations, in which any court in a state where the child is found may enter a temporary order.[191] Another proposal is that another court should not exercise jurisdiction unless the first court has expressly declined to exercise further jurisdiction.[192]

But what if, in a particular instance, the abduction is in the child's best interest? In 1992, the Supreme Court of Wisconsin found that even though the best interests of the children would be served by adjudicating their custody modification in Wisconsin, their home state at the time of the suit, Wisconsin was prevented from doing so by the PKPA, since the original forum had properly exercised jurisdiction and remained the residence of the children's father: "These jurisdictional provisions of the PKPA . . . cannot be circumvented in favor of an individual best interests test."[193] Adjudication of the children's best interests was subjugated to the goal of reaching a more certain outcome. But the more flexible the standards in custody disputes, the less the impact on the elimination of childsnatching.[194] The goal of flexibility requires that courts should be free to decide each case individually, which means that the result is not predictable. As the *Lemley* court phrased it in the oft-repeated language, "we are not ordering the transfer of a piece of property, but rather with [sic] a feeling, vulnerable, and sorely put upon little human being."[195]

> Is it possible to promote the best interests of a child in a custody battle while, at the same time, furthering a policy designed to counter the phenomenon of childsnatching? . . . Courts will invariably interpret the same legislation in differing

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188. Professor Blakesley repeatedly used the term "schizophrenic" to describe the UCCJA. *See* Blakesley, *supra* note 68, at 374.

189. It is beyond the scope of this Note to respond to the many criticisms that the UCCJA and the PKPA inadequately resolve jurisdictional deadlock in all cases. Rather, this Note focuses on cases involving one parent and one non-parent.

190. Goldstein, *supra* note 14, at 942-46.

191. *Id.*

192. James C. Murray, *One Child's Odyssey Through the Uniform Child Custody Jurisdiction and Parental Kidnapping Prevention Acts*, 1993 Wis. L. Rev. 589, 610-11.

193. Michalik v. Michalik, 494 N.W.2d 391, 398 (Wis. 1993).

194. *See supra* subpart I.A.

195. Lemley v. Barr, 343 S.E.2d 101, 104 (W. Va. 1986).

> ways, depending on the policy seen as paramount. . . . Thus, even with the advent of the UCCJA, the jurisdictions have been troubled by these competing policies. While the legislation shaped policy by expressing a preference in favor of suppression of child-snatching, the law has not resolved the conflict inherent in the nature of child custody litigation.[196]

Even though society does not want to reward the lawless, "circumstances may require that, in the best interest of the child, the unlawful acts be blinked."[197] One commentator urges that, since children have a constitutional interest in the custody proceeding, due process requires balancing the child's right to be reared by the person with whom he or she has bonded against any legal right claimed by a contestant under the UCCJA and the PKPA.[198]

B. Proposal for a Prophylactic Measure

What can courts do to avoid the sticky situations that arise from parent/non-parent interstate custody disputes? Due to the risk that another court will find that the first forum declined to exercise jurisdiction to determine best interests, there is a very simple solution. In every interstate case, the first forum should consider adjudicating the child's best interests. This proposal does not mean that every state should apply the best interests standard. It does mean that the first forum should close the door to jurisdictional uncertainty by precluding a second forum from claiming jurisdiction based on the first forum's refusal to adjudicate that issue.

> The UCCJA embeds the highly indeterminate, fact-sensitive, "best interests of the child" standard in every jurisdictional determination. . . . This virtually ensures that in every interstate custody matter each court will consider the children's best interests—that is, the merits of the case—in deciding whether to exercise jurisdiction or to defer to another court's decision-making. Whenever the forum, after examining the merits, comes to a conclusion that differs from the decree court's decision, it is bound to be strongly tempted to remedy what it perceives as a wrong, by asserting and exercising jurisdiction.[199]

The original fora in *E.E.B. v. D.A.*, (the Ohio courts) and *DeBoer* (the Iowa courts) refused to grant such a hearing, thereby opening the door for another forum to do so.[200] In DeBoer, Michigan's Washtenaw Circuit Court claimed jurisdiction due to Iowa's refusal to hold a best interests hearing.[201]

At first blush it may appear that jurisdictional statutes would thereby meddle with substantive law; but it is also true that, under the existing system of wide disparity of interpretation of the UCCJA and the PKPA, a custody decision in one state might not be

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196. Blakesley, *supra* note 68, at 373-74.

197. Bennett v. Jeffreys, 356 N.E.2d 277, 284 (N.Y. 1976).

198. Blakesley, *supra* note 68, at 378-79.

199. Goldstein, *supra* note 14, at 940-41.

200. E.E.B. v. D.A., 446 A.2d 871, 873 (N.J. 1982), *cert. den.,* 459 U.S. 1210 (1983); DeBoer v. Schmidt, 502 N.W.2d 649, 652-53 (Mich. 1993), *stay denied sub nom.* DeBoer v. DeBoer, 114 S.Ct. 1 (1993), *stay denied,* 114 S.Ct. 11 (1993).

201. *DeBoer*, 502 N.W.2d at 653 (Levin, J., dissenting).

recognized in a sister state whose substantive standard for parent/non-parent cases differs if the second state interprets the jurisdictional Acts so as to allow it to reach the merits of the case. The differences in interpretation of these Acts from state to state has been widely documented.[202] In order to prevent a sister state from interpreting the Acts differently in order to find that it has jurisdiction to modify the first forum's decision, the first forum can protect its decision by holding a best interests hearing as part of its adjudication process. Ultimately, if this tension in the law induces courts to grant best interests hearings where they otherwise would not, both policies behind the jurisdictional Acts would be promoted: children's best interests would be furthered because courts would actually hear arguments on and decide that issue; and, certainty of outcome would be achieved because sister states would lose the opportunity of refusing to grant full faith and credit to the first finding, leaving no room for the sister state to exercise that jurisdiction itself. Examination of the Acts and the state standards supports this solution.

One compelling argument is that the failure of a court to apply a "best interests of the child" standard is a failure to exercise jurisdiction "substantially in compliance" with the Acts. But the Acts were adopted by individual jurisdictions entitled to apply their own standard to a parent/non-parent custody dispute. They need not follow the best interests standard. In *DeBoer*, the Michigan Supreme Court noted that the PKPA is a procedural statute that does not impose "principles of substantive law" on the individual states.[203] The court found that because the PKPA was not a substantive statute, it could not mandate that Michigan conduct a best interests test since this would infringe on Iowa's right to apply its own rules of law. Even if the Acts do not *require* a best interests hearing, such a test is definitely consistent with the Acts.

One recent article views the PKPA optimistically, arguing that the Act does not deserve all the criticism it receives since progress and uniformity in the law are slowly evolving and must be expected to take time.[204] Given time, under this proposal, even more uniformity and repose could be achieved in child custody decisions. Under the state substantive standard, factors affecting the custody disposition can be considered in order to decide whether the child's best interests are being served. Since some states weigh parents' rights more heavily than other states, the best interests adjudication in those states would take into account the greater weight. In this way, federal law would not infringe upon states' rights to determine their own family law. Moreover, certainty in the law would result in the long run. If states litigated the best interests of children from the start, other forums would have no basis to deny full faith and credit to the first forum's decision, and, eventually, the UCCJA's and the PKPA's goal of reducing volume of litigation would be realized. Whether or not a second forum is right in taking jurisdiction because of refusal of the first forum to decide best interests, the fact is that the risk exists. Courts inevitably interpret the Acts differently, which leads to jurisdictional uncertainty. As a prophylactic measure, granting a best interests in the first place closes that door of uncertainty.

The UCCJA and the PKPA were enacted for cases in which the contestants are two parents, where the universal standard is that of the best interests of the child.[205] But when

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202. *See, e.g.*, Goldstein, *supra* note 14, at 938-41; Blakesley, *supra* note 68, at 373-75.

203. *DeBoer*, 502 N.W.2d at 658 n.24.

204. *See* Baron, *supra* note 10, at 911-12.

205. *See supra* note 86 and accompanying text.

these Acts are applied where one contestant is a non-parent, standards vary from state to state, some of them giving very little weight to the child's best interests. Since the "underlying theme of the PKPA and the UCCJA is that a determination of custody and visitation should be made according to the child's best interests,"[206] then that goal would be furthered. Presumably (or ideally), if the court from the child's statutorily-determined home state conducted a best interests hearing and found that another state with significant connections to the child would be the better place to dispose of the case, the court would decline jurisdiction. Of course, this proposal will not avoid all jurisdictional uncertainty, but if the amount of uncertainty decreases, courts, litigants, and the children themselves would benefit.

CONCLUSION

Because jurists, litigants, and people outside the legal field inevitably will disagree over which approach to the UCCJA and the PKPA is appropriate, and how best to promote the policies behind them, courts cannot always be certain whether their child custody decisions will be enforced in the courts of a sister-state. Commentary on the Acts is voluminous, ranging from strong support for their effectiveness to recommendations for their repeal.[207] At the very least, disagreement over how to apply the Acts exists. Therefore, a court would be wise to end the jurisdictional competition in parent/non-parent cases by adjudicating best interests even where state substantive law does not mandate it. In cases of this kind, the policy choices are so complex that there can never be any easy answers. But if confusion can be reduced while the best interests of children are furthered, the Acts would be more effective.

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206. *DeBoer*, 502 N.W.2d at 676.

207. *See, e.g.*, Baron, *supra* note 10 (contending that, although progress is slow, the Acts will eventually solve the problem of jurisdictional competition); Nancy S. Erickson, *The Parental Kidnapping Prevention Act: How Can Non-Marital Children be Protected?*, 18 GOLDEN GATE U. L. Rev. 529 (1988) (arguing that although the UCCJA and the PKPA effectively protect children born in wedlock, they do not protect children born out of wedlock); Goldstein, *supra* note 14 (urging repeal of the Acts).

STEPHENS V. MILLER: RESTORATION OF THE RAPE DEFENDANT'S SIXTH AMENDMENT RIGHTS

LISA M. DILLMAN*

INTRODUCTION

On March 17, 1987, in Blackford County, Indiana, Lonnie Stephens went out for an evening of drinking with his friend David Stone. On the way home, Stone dropped Stephens off at Melissa Wilburn's trailer home. At this point, the facts of the case begin to vary dramatically depending on whom you ask.[1] However, Wilburn was allowed to tell her side of the story in the courtroom; Lonnie Stephens was not.[2]

Wilburn's account of the evening began with Stephens arriving at her trailer uninvited. Wilburn said she was sleeping on the couch when Stephens entered the trailer and made sexual advances toward her. Wilburn claimed that she rejected Stephens' advances and told him to leave. She stated that she screamed for her sister, who was sleeping in the next room, but her sister did not respond to her cries for help. Wilburn asserted that Stephens threw her on the couch, got on top of her, held her arms, and covered her mouth when she tried to scream. Wilburn also stated that Stephens unfastened his pants and tore her shirt and bra, but she was able to push him off and avoid the impending rape.[3]

Wilburn was allowed to recount the evening of March 17 with great detail during her testimony. However, when Lonnie Stephens told his side of the story to the jury, he was not able to report several details that were critical to his theory of defense. The only facts that Stephens was able to include in his account of the evening were that he asked Stone to drop him off at the trailer because he was invited there by Wilburn.[4] After arriving, Stephens claimed that he and Wilburn began to kiss and engage in foreplay until they decided to have sexual intercourse. During this consensual intercourse, Stephens made certain statements that angered Wilburn. Stephens claimed that his statements motivated Wilburn to invent the story about the attempted rape in order to exact revenge.

Stephens was not able to educate the trier of fact as to the critical content of those statements because the prosecution successfully objected to admission of the evidence on the grounds that it involved past sexual activity of the victim and was, therefore, precluded by Indiana's rape shield statute.[5] In an offer of proof, Stephens testified that he and Wilburn

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1. Stephens v. Miller, 13 F.3d 998, 1000 (7th Cir. 1994).
2. *Id.*
3. *Id.*
4. *Id.*
5. Stephens v. Miller, 989 F.2d 264, 267 (7th Cir. 1993). Indiana's rape shield statute provides, in pertinent part:

(a) In a prosecution for a sex crime as defined in IC 35-42-4:

(1) Evidence of the victim's past sexual conduct;

(2) Evidence of the sexual conduct of a witness other than the accused;

(3) Opinion evidence of the victim's past sexual conduct;

(4) Opinion evidence of the past sexual conduct of a witness other than the accused;

(5) Reputation evidence of the victim's past sexual conduct; and

(6) Reputation evidence of the past sexual conduct of a witness other than the accused;

were engaged in intercourse "doggy fashion" when Stephens said to her, "Don't you like it like this? . . . Tim Hall said you did."[6]

Lonnie Stephens was found guilty of attempted rape and sentenced to twenty years in prison.[7] The Indiana Supreme Court affirmed the trial court decision, 3-2.[8] Stephens was denied habeas corpus relief by the United States District Court for the Northern District of Indiana.[9] On appeal, the United States Court of Appeals for the Seventh Circuit granted Stephen's petition for a writ of habeas corpus,[10] holding that "Stephens' Sixth Amendment right to testify on his own behalf guarantees him the right to tell a jury a full account of his version of the incident . . . in order to properly balance the credibility and believability of both Stephens' and Wilburn's testimony."[11] A motion for a hearing en banc was filed and so ordered on June 9, 1993.[12] On January 6, 1994, the eleven-member panel handed down a 6-5 decision that upheld Indiana's rape shield law by affirming the trial court's exclusion of the evidence relating to the contents of the conversation between Stephens and Wilburn.[13] This 6-5 split demonstrates the tension surrounding rape shield laws in the Seventh Circuit and begs the United States Supreme Court to grant a writ of certiorari.

The purpose of this Note is to examine the legal and social dynamics of the current applications of rape victim shield statutes. This examination concludes that the enactment of rape shield statutes has not made the prosecution of rape more fair or less traumatic for the parties involved. To the contrary, this legislation has displaced the inequity onto the rape defendant and his[14] Sixth Amendment rights. Part I will discuss the social, political, and legal factors that inspired rape shield legislation. Part II will explore the contemporary application of the balancing test that weighs state and victim interests against the defendant's Sixth Amendment rights. Part III examines *Stephens v. Miller* and questions whether the balancing test employed by the courts results in a constitutional application of rape shield statutes. Finally, Part IV explores possible arguments that the United States Supreme Court should, and possibly will, employ when reviewing the constitutional implications of the balancing test implicated by rape shield statutes.

> may not be admitted, nor may reference be made to this evidence in the presence of the jury, except as provided in this chapter.

IND. CODE § 35-37-4-4 (1989).

6. *Stephens*, 989 F.2d at 266.
7. Stephens v. State, 544 N.E.2d 137, 138 (Ind. 1989).
8. *Id.* at 140.
9. Stephens v. Morris, 756 F. Supp. 1137, 1138 (N.D. Ind. 1991).
10. *Stephens*, 989 F.2d at 264, 269 (7th Cir. 1993).
11. *Id.* at 268-69.
12. *Id.* at 269.
13. Stephens v. Miller, 13 F.3d 998 (7th Cir. 1994).
14. For purposes of this article, reference to the rape defendant will imply the male rape defendant, while reference to the rape victim will imply the female rape victim.

I. The Development of Rape Shield Statutes

Rape victim shield statutes are currently in force in nearly all state[15] and federal jurisdictions.[16] These statutes exclude reputation or opinion evidence of the past sexual behavior of the alleged victim.[17] This broad exclusion is limited when the evidence

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15. Versions of the rape victim shield laws exist in nearly all fifty states. *See* Ala. Code § 12-21-203 (Supp. 1986); Alaska Stat. § 12.45.045 (1990); Ark. Code Ann. § 16-42-101 (Michie Supp. 1994); Cal. Evid. Code. § 782, 2 1103 (Bancroft & Whitney Supp. 1990); Colo. Rev. Stat. § 18-3-407 (1990); Conn. Gen. Stat. Ann. § 54-86f (West 1989); Del. Code Ann. tit. 11, §§ 3508, 3509 (1989); Fla. Stat. Ann. § 794.022 (West Supp. 1990); Ga. Code Ann. § 24-2-3 (Supp. 1989); Haw. Rev. Stat. § 626-1, Rule 412 (1986); Ill. Rev. Stat. ch. 38, para. 115-17 (1990); Ind. Code § 35-37-4-4 (Smith-Hurd 1989); Kan. Stat. Ann. § 21-3525 (Supp. 1988); Md. Code Ann. Crimes and Punishments art. 27 § 461A (Supp. 1990); Mass. Ann. Laws ch. 233, § 21B (Law. Co-op. 1990); Mich. Comp. Laws. Ann. § 750.520j (West Supp. 1990); Minn. Stat. Ann. § 609.347 (West 1990); Mo. Rev. Stat. § 491.015 (1989); Mont. Code Ann. § 45-5-511(2) (1989); Neb. Rev. Stat. § 28-321 (1984); Nev. Rev. Stat. Ann. §§ 48.069, 50.090 (Michie 1989); N.H. Rev. Stat. Ann. § 632-A:6 (1989); N.J. Stat. Ann. § 2A:84A-32.1 (West Supp. 1990); N.M. Stat. Ann. Rule 11-413 (1978); N.Y. Crim. Proc. Law § 60.42 (Consol. 1990); N.C.R. Evid. 412 (Supp. 1985); N.D. Cent. Code § 12.1-20-14 (1989); Ohio Rev. Code Ann. § 2907.02(D) (Baldwin Supp. 1990); Okla. Stat Ann. tit. 12, § 2412 (West Supp. 1994); Or. Evid. Code 412 (Purdon 1981); 18 Pa. Cons. Stat. Ann. § 3104 (1990); R.I. Gen. Laws § 11-37-13 (1989); S.C. Code Ann. § 16-3-659.1 (Law. Co-op. 1990); S.D. Codified Laws Ann. § 23A-22-15 (Supp. 1990); Tex. R. Crim. Evid. 412 (1986); Vt. Stat. Ann. tit. 13, § 3255 (1990); Va. Code Ann. § 18.2-67.7 (Supp. 1990); Wash. Rev. Code. Ann. § 9A.44.020 (West 1990); Wis. Stat. § 972.11 (1987); Wyo. Stat. § 6-2-312 (1989).

16. Fed. R. Evid. 412.

17. Federal Rule of Evidence 412 typifies the content of rape victim shield statutes:

Rule 412. Sex Offense Cases; Relevance of Victim's Past Behavior

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.

[Subsection (c) gives the procedural requirements for admitting evidence pursuant to subsection (b).]

Id.

addresses the victim's consent or when the Constitution so requires.[18] The rape shield statute, in its various forms,[19] has emerged in reaction to the social and legal atmosphere that for centuries has made the female rape victim either too fearful to prosecute or, if she did decide to prosecute, made her regret that decision. The evidentiary rules in place before 1975 with regard to rape prosecutions created an environment in which the victim was forced to endure a double victimization.[20] First, a female rape victim was exposed to the physical and emotional crises incurred by the rape and the ensuing recovery from the assault. Second, female victims were forced to face the trauma that the criminal justice system inflicted upon them. The system permitted the wholesale admission of evidence pertaining to the victim's sexual history, sexual reputation, and appearance. In effect, the courtroom served as a tribunal for determining the chastity of the victim and whether she may have deserved what had happened to her.

While this scenario may seem unjust and outrageous today, there were two justifications for the procedures that were in place during these rape trials. First, the patriarchal social model espoused by the prominent eighteenth century jurist, Matthew Hale, described rape as "an accusation easily to be made and hard to be proved and harder to be defended by the party accused though never so innocent."[21] This statement suggests that the legal community took its cue from the social climate of the time. Since society believed that the men who were called upon to defend rape charges suffered from the stigma of having been accused, not to mention the annoyance of having to refute the charges, the legal world also operated under these conceptions. According to society, as well as the legal community, the male defendant's burden superseded the injury that a female victim may have suffered from the attack.

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18. Constitutional Amendments, in pertinent part, that are possibly implicated by evidence preclusion involved in applying rape shield statutes:

Amendment VI [1791]

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

Amendment XIV [1868]

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

19. For discussion of individual rape shield statutes by jurisdiction, see Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980) (different jurisdictional treatments of rape shield laws hinder the admissibility of evidence pertaining to an alleged victim's sexual history).

20. *See generally* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985).

21. DEBORAH L. RHODE, JUSTICE AND GENDER 248 n.50 (1989) (citing SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1847)).

The second justification for the procedures that disfavored female victims is illustrated by the female psychological model that was based upon "crude Freudian analysis"[22] and adopted by John Wigmore, the author of the most significant treatise on evidence written in the twentieth century.[23] The Freudian position asserts that females desire and perhaps fantasize about forced sex.[24] Legal scholars during this period promoted this position by allowing the assumption that female rape victims send mixed signals to their attackers.[25] In fact, Wigmore stated that it was probable for women to invent rape accusations and it was "easy for some neurotic individuals to translate their fantasies into actual beliefs and memory falsifications."[26] This position gave rise to the notion that females were socialized to say "no, no, no" even when they meant "yes, yes, yes."[27] These justifications created an environment in which female rape victims stood little chance of successfully prosecuting a rape and an even smaller chance of avoiding the trauma that the criminal justice system imposed upon prosecuting victims. In essence, the social justifications and female psychological explanations served to abdicate the legal community, as well as society at large, by wrapping the female victim in guilt and shame with regard to her prior sexual activity and sexual reputation.

The early common law definition of rape that emerged from this social and political backdrop required that (1) a man's sexual intercourse, (2) be with a woman, (3) other than his wife, (4) against her will.[28] This common law tradition allowed certain inferences to operate among the jurors when they considered a rape case. First, by introducing evidence that the victim's sexual history demonstrated incidents of promiscuity or unchastity, the jury was allowed to infer that since the victim consented to sexual intercourse in the past, she consented to sexual intercourse in the case at bar.[29] Second, by introducing evidence that the victim's appearance at the time of the attack was indecent or erotic, the jury could infer that the victim must have asked for the sexual assault.[30] This transferred the blame from the attacker to the victim. Furthermore, the second inference may have collapsed into the first by allowing a jury to believe that the victim was unchaste because of her appearance, and this assumed unchastity could lead to the assumption that she consented to sexual intercourse in a particular case.

This set of assumptions may be considered a blight on our legal tradition. In reality, however, this sentiment is not that far removed from contemporary courtroom reasoning. In 1989, a rape defendant was acquitted on charges that he had kidnapped and sexually assaulted a woman at knifepoint.[31] When the jurors were questioned following the verdict,

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22. *Id.* at 247.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* (quoting JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 744 (1970)).

27. *Id.*

28. *Id.* at 246.

29. *Id.* at 245.

30. *Id.*

31. Barbara Fromm, *Sexual Battery: Mixed-Signal Legislation Reveals Need for Further Reform*, 18 FLA. ST. U. L. REV. 579, 579 (1991).

one claimed that "[s]he asked for it . . . she was advertising for sex."[32] Another juror concurred by saying "we felt she was up to no good [by] the way she was dressed."[33] This reasoning is a product of the social and psychological justifications discussed above, as well as the assumptions that the common law allowed the jury to make. The case spurred rape shield legislation in that state the following year,[34] but it is the underlying issue of protecting victims' rights that has driven the nation to overhaul its evidentiary position with regard to rape prosecutions.

The Violence Against Women Act of 1993 is an updated version of the legislation that President Carter signed into law in 1978 in response to the need for protection of victims' rights.[35] The Act strives to eradicate the traditional misconceptions about the crime of rape. One telling example of this effort is found in the section entitled *Equitable Treatment Of Rape Cases*[36] which addresses the difficulties in obtaining convictions for rape. These difficulties stem from the traditional legal definition of rape and the evidentiary requirements involved. The traditional version of rape involved a chaste, helpless victim and a violent, brutal stranger.[37] This rape paradigm perpetuated the difficulties involved in prosecuting rape cases that did not conform to the traditional scenario. The Violence Against Women Act is aimed at the prosecution of the types of rape that do not conform to the rape paradigm. The Act compels a state to certify that "its laws and policies treat sex offenses committed by offenders who are known to, cohabitants of, social companions of, or related by blood or marriage to, the victim no less severely than sex offenses committed by offenders who are strangers to the victim."[38] The status of the sex offenders given attention by the Act illustrates the purpose of the Act. Because these types of people are capable of committing rape, they deserve no less punishment under the law than the brutal stranger. The Act cites these people in an effort to dismantle the common law rape paradigm and equalize the judicial approach to all rape cases. The evolution of the philosophy surrounding the social, political, and legal approach to rape cases has permeated rape shield legislation, as well as the case law that upholds rape shield statutes.

II. The Application of Rape Shield Statutes

The rule of law that emerged in response to both the inequality that rape victims faced in the past and the onslaught of national attention to rape victims' rights,[39] is one that simply lets the scales of justice fall in favor of the victim. This evolution is not remedial; it only creates a different victim. Nevertheless, the United States Supreme Court has found that rape shield statutes, on their face, are not necessarily unconstitutional. The last time the

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32. *Id.* at 579 n.2.
33. *Id.* at 579 n.3.
34. *Id.* at 579-80, referring to FLA. STAT. ch. 794.022 (1993).
35. 123 Cong. Rec. H.R. 408 (1977).
36. H.R. 1133, 103rd Cong., 1st Sess. § 114 (1993).
37. RHODE, *supra* note 21, at 245.
38. H.R. 1133, *supra* note 36.
39. Henderson, *supra* note 20, at 949-50.

Supreme Court addressed the constitutional issues implicated by rape shield legislation was in the 1991 case of *Michigan v. Lucas*.[40]

In *Lucas,* the Court noted that a criminal defendant's right to testify is not unlimited but "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[41] The Court reviewed a statutory exception to Michigan's rape shield statute that allows a rape defendant to introduce evidence of his own past sexual conduct with the victim, provided that he file a motion for a hearing to determine the admissibility of the proffered evidence within ten days of his arraignment. The defendant in *Lucas* failed to meet this notice-and-hearing requirement and argued that preclusion of the proffered evidence violated his constitutional rights under the Sixth Amendment.[42] The Court, therefore, was not faced with the intricate constitutional problems involved in applying Michigan's rape shield statute, but was asked only to deal with the constitutionality of its procedural content.

In *Lucas,* the Court clearly and consciously defined (1) the victim's interest in precluding the evidence, (2) the State's interest in precluding the evidence, and (3) the defendant's interest in admitting the evidence. The Court stated that the statute is a valid legislative determination that a rape victim deserves protection from the harassment and unnecessary invasions of privacy that would occur by admitting evidence of her past sexual conduct.[43] The State's interest in precluding the evidence is similar to the victim's in that it strives to protect the victim from these humiliations and encourages the public to report sexual assault crimes. The State, by insuring that the victim's exposure to the criminal justice system will not traumatize her any more than the attack itself, believes more victims will report the incidence of the crime. The Court also recognized the defendant's interest in exercising his Sixth Amendment right "to confront adverse witnesses and present a defense."[44]

The Court assigned a test that instructs trial judges, when faced with these competing interests in the adversarial setting, to balance the rival interests and determine which interests should be preserved at the inevitable expense of the other interests. "'[T]rial judges retain wide latitude' to limit reasonably a criminal defendant's right to cross-examine a witness 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'"[45]

By ordering this type of analysis, the Court constitutionally approved the legitimacy of the victim's and state's interests in inspiring rape shield legislation. The Court found that rape shield legislation is not unconstitutional on its face. However, not once did the Court offer constitutional approval of the *application* of rape shield statutes in general or in specific factual situations. The Court stated that "[t]he sole question presented for our review is whether the legitimate interests served by [state rape shield requirements] . . . can ever justify precluding evidence of a prior sexual relationship."[46] It answered by stating "[t]he Sixth

40. 500 U.S. 145.

41. *Id.* at 149 (quoting Rock v. Arkansas, 483 U.S. 44, 55 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973))).

42. *Id.* at 146-47.

43. *Id.* at 149-50.

44. *Id.* at 149.

45. *Id.* at 149 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986)).

46. *Id.* at 151.

Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system."[47] Therefore, the Court's holding allows states to enact legislation that may limit a defendant's Sixth Amendment rights, but the Court did not speak to the constitutionality of the application of the legislation that the states enact.

The *Lucas* balancing test[48] is consistent with a body of case law that has developed in the state courts and the federal circuits. The majority rule generally upholds the constitutionality of rape shield statutes and employs a balancing test similar to the one described in *Lucas*. Nearly all the states that have enacted rape shield statutes can offer case law upholding the constitutionality of those laws.[49] Most of those states also apply the *Lucas* balancing test.[50]

This national endorsement of the rape shield statutes does not end in state tribunals. Most of the federal circuit courts carefully adhere to the nationally favored policy that rape shield statutes are constitutional. Once a court commits to this premise, the method of applying the statute is most likely to be a version of the *Lucas* balancing test.

The Fourth Circuit upholds the constitutionality of the purpose behind the rape shield statute by relying on legislative history. In *Doe v. United States*,[51] the appeals court held that "reputation and opinion evidence of the past sexual behavior of an alleged victim was excluded because Congress considered that this evidence was not relevant to the issues of the victim's consent or her veracity."[52]

The Sixth Circuit, in *United States v. Niece*,[53] held that the applicability of the rape shield statute is clearly within the discretion of the trial court.[54] This holding is consistent with the *Lucas* holding, which applied the rape shield statute by using the balancing test and placed final authority in the discretion of the trial court.[55]

The Tenth Circuit steadfastly adheres to the *Lucas* principles. The court has determined that "Congress performed its own balancing test and adopted a per se rule that evidence of a victims [sic] past sexual behavior with third parties is never more probative than prejudicial on the issue of consent."[56] The Ninth Circuit depended on *Lucas* in ruling that

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47. *Id.* at 152 (quoting United States v. Nobles, 422 U.S. 225, 241 (1975)).

48. *Id.* at 149.

49. *See, e.g.*, State v. Howard, 426 A.2d 457 (N.H. 1981); State v. Fortney, 269 S.E.2d 110 (N.C. 1980); State v. Blue, 592 P.2d 897 (Kan. 1979); State v. Green, 260 S.E.2d 257 (W. Va. 1979); Marion v. State, 590 S.W.2d 288 (Ark. 1979); Roberts v. State, 373 N.E.2d 1103 (Ind. 1978); State v. Ryan, 384 A.2d 570 (N.J. Super. Ct. App. Div. 1978); State v. Herrera, 582 P.2d 384 (N.M. Ct. App. 1978); People v. Mandel, 403 N.Y.S.2d 63 (N.Y. App. Div. 1978), *rev'd on other grounds*, 401 N.E.2d 185 (N.Y. 1979); Smith v. Commonwealth, 566 S.W.2d 181 (Ky. Ct. App. 1978); People v. McKenna, 585 P.2d 275 (Colo. 1978); People v. Blackburn, 128 Cal. Rptr. 864 (Cal. Ct. App. 1976).

50. *See supra* note 49.

51. 666 F.2d 43 (4th Cir. 1981).

52. *Id.* at 48.

53. No. 93-5011, 1993 U.S. App. LEXIS 27327, at *1 (6th Cir. Oct. 19, 1993).

54. *Id.* at *18.

55. Michigan v. Lucas, 500 U.S. 145, 149 (1991).

56. United States v. Galloway, 937 F.2d 542, 551 (10th Cir. 1991) (Seymour, J., concurring), *cert. denied*, 113 S.Ct. 418 (1992).

even though evidence is relevant, "it may properly be excluded if its probative value is outweighed by other legitimate interests."[57]

This consistency among the states, as well as the circuits, is called into question by the Seventh Circuit. The closeness of the vote in *Stephens v. Miller*[58] draws attention to the question of whether a constitutional violation occurs by the preclusion of evidence relevant to a defendant's theory of defense.

III. Questioning the Balancing Test

The turbulence this issue creates is epitomized in *Stephens v. Miller.*[59] This case provides a timely example of the tension between state rape shield statutes, the manner in which they are administered, and the proscription of a defendant's Sixth Amendment liberties. As discussed above,[60] the procedural history of *Stephens* illustrates the struggle between state and local sentiment to uphold rape shield statutes and the national liberty interest in enforcing the Constitution. The Circuit Court of Blackford County convicted Lonnie Stephens of attempted rape and sentenced him to twenty years in prison.[61] The trial court applied the majority rule balancing test[62] in favor of the victim. However, the Indiana Supreme Court did not apply the rape shield statute as readily. The Indiana Supreme Court split 3-2.[63] The majority arrived at its decision without addressing the question of whether the rape shield statute is inherently constitutional.[64] However, the issue is not whether the statute itself is constitutional, nor whether the purpose of the statute is constitutionally valid. Rather, the issue is whether the application of the statute denies a defendant his Sixth Amendment rights. The Indiana Supreme Court avoided this tough question.

Instead, the majority prolonged the life of the rape shield statute by avoiding the possible constitutional problems with its application. Stephens asserted that by applying the statute mechanistically, presumably under an assumption that the victim's interests outweigh the defendant's interests, his constitutional right to present a complete defense was violated.[65] Stephens requested that the statements he made to the victim regarding her past sexual activity be viewed as a type of res gestae exception to the proscription of hearsay testimony.[66] That is, Stephens claimed that the statements were not offered to demonstrate aspects of the victim's past sexual conduct, but as a means of relating the facts as they affected Stephens' defense. Presumably, the statements he made to the victim were the turning point in the sexual activity where the victim allegedly withdrew her consent. This information is critical to Stephens' theory of defense that he and the victim were initially engaged in consensual

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57. Wood v. Alaska, 957 F.2d 1544, 1551 (9th Cir. 1992).

58. 13 F.3d 998 (7th Cir. 1994). *See supra* notes 1-13 and accompanying text.

59. 13 F.3d 998.

60. *See supra* introductory text and notes 1-13.

61. *See supra* note 7.

62. *See supra* note 13.

63. *See supra* note 8.

64. Stephens v. State, 544 N.E. 2d 137, 139 (Ind. 1989).

65. *Id.*

66. *Id.* Stephens asked for a res gestae exception even though the exception he really sought was more akin to Sixth Amendment implications of presenting exculpatory evidence.

sexual intercourse and that something angered the victim enough for her to withdraw her consent and fabricate the charge of attempted rape. In response to Stephens' request that the court allow this type of exception to the wholesale preclusion of the victim's past sexual conduct, the court stated that "approval of such an exception would open the door for evading the statute entirely."[67] This answer does not sufficiently address the liberty interests at stake. In order to deprive a defendant of the right to present a complete defense and confront his accuser, the court must give a better reason than the "floodgates" argument that it offers.

Although the Supreme Court in *Lucas* found a particular rape shield statute constitutional on its face and the purpose of rape shield statutes, in general, constitutionally valid,[68] a ruling that finds exception with application of the statute would not necessarily go against the *Lucas* holding. Justice DeBruler's dissent for the Indiana Supreme Court in *Stephens* is based on the argument that the statute and the purpose of the statute can be constitutionally valid, but the result of its application may violate the Constitution.[69] Justice DeBruler stated that "[t]he purpose of the rape shield statute is a good and legitimate one. However, the defendant has the right to be heard in court and to give his version of the events upon which the state relies for conviction."[70] The tenor of this argument plays on the oldest sanction this country knows. Justice DeBruler simply asked that the judicial system be true to the foundation on which it was built. The dissent noted that the constitutional right that Stephens seeks to protect is "the right of the accused to be heard in the tribunal."[71] The dissent insists that this right is "among the most sacrosanct and most essential to a fair determination of guilt."[72] Justice DeBruler concluded his opinion with the following declaration:

> Such right is, I believe, paramount in this situation, and the interest served by the rape shield statute must give way so as to permit the defendant to speak his piece under oath in front of the trier of fact with regard to the events transpiring at the time of the offense which serve the interests of the defense in any rational way.[73]

This near-death experience for the rape shield statute in the Indiana Supreme Court set the scene for a tumultuous ride throughout the habeas corpus appeals process. The Federal District Court for the Northern District of Indiana,[74] after carefully defining the interests that would be used to conduct the balancing test, determined that the trial judge applied the rape shield statute appropriately: "The trial judge tried to carefully and moderately apply the rape shield statute by allowing the petitioner to testify to all events that he alleged occurred that evening."[75]

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67. *Id.*
68. Michigan v. Lucas, 500 U.S. 145 (1991).
69. *Stephens*, 544 N.E.2d 137, 141 (DeBruler, J., dissenting).
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. Stephens v. Morris, 756 F. Supp. 1137 (N.D. Ind. 1991).
75. *Id.* at 1142.

This was the first time in the procedural history of this case that a court examined the application of the statute rather than its constitutional aspects as a piece of legislation, or the constitutionality of its underlying policy. However, the federal district court did not discuss the constitutional aspects of the application that it endorsed. Without this discussion, one cannot be certain that the court is addressing the critical issue of whether the application of the rape shield statute is constitutional, or whether the court confuses that issue with the constitutionality of the statute itself. The district court cited several cases to support its denial of a writ of habeas corpus, but all of the cases to which it referred addressed the constitutionality of the statute and the policies supporting it instead of the constitutionality of its application.[76] The district court relied heavily on *Chambers v. Mississippi*[77] to support the constitutionality of the trial court's ruling in *Stephens*.[78] However, the federal district court used *Chambers* to show that the statute and its supporting policies are constitutional. It stated that "the right of a petitioner to present relevant and competent evidence is not absolute and may bow to accommodate other legitimate interests in the criminal trial process."[79] The court further stated that "[i]n balancing the competing interest underlying Indiana's Rape Shield Statute and the constitutional policies favoring petitioner's right to testify, this court must first closely examine the justification of the state interest."[80]

These statements clearly show that the court focused on the constitutional legitimacy of the interests and policies involved, rather than the actual application of the statute with regard to these competing interests. After determining that the principal reasons for the rape shield statutes are constitutional, the court immediately declared that "[t]he state's interest of protecting the victim was carefully balanced with the petitioner's constitutional right to testify."[81] The court makes a leap from the constitutionality of the statute's purpose to the constitutionality of the application of the statute and the effect on the defendant's Sixth Amendment rights. This analysis omitted the crucial step of deciding the issue of application. Consequently, the court denied the defendant's request for a writ of habeas corpus.[82]

Seven months later, a panel of three judges sitting by designation for the Court of Appeals for the Seventh Circuit, held that the application of rape shield statutes violated the defendant's Sixth Amendment right to testify on his own behalf.[83] The panel ruled that "[a]n accused in a criminal trial has a right to offer testimony in support of his defense, including

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76. *Id.* (citing Hughes v. Matthews, 576 F.2d 1250, 1258 (7th Cir. 1978) (citing Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (holding that the right of the petitioner to present relevant and competent evidence is not absolute and may bow to accommodate other legitimate interests in the criminal trial process); Moore v. Duckwork, 687 F.2d 1063, 1065 n.2 (7th Cir. 1982) (noting the lack of doubt that Indiana has a legitimate interest in encouraging victims of sex offenses to report the crime, free of fear of being harassed or humiliated when put on the stand); and Thomas v. State, 471 N.E.2d 681 (Ind. 1984) (reasoning that rape shield statutes shield victims' past sexual conduct and keep them from feeling that they are on trial))).

77. 410 U.S. 284 (1973).

78. *Stephens*, 756 F. Supp. at 1142.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1143.

83. Stephens v. Miller, 989 F.2d 264 (7th Cir. 1993).

his own testimony."[84] The panel went on to explain all of the constitutional implications of this ruling. First, the right to testify in one's own defense arises out of the Fourteenth Amendment's protection against deprivation of liberty without due process of law.[85] Second, the Compulsory Process Clause of the Sixth Amendment guarantees the accused the opportunity to face his accuser.[86] Third, the Sixth Amendment Compulsory Process pertains to the states via the Fourteenth Amendment.[87] Fourth, the Fifth Amendment guards against compelled testimony.[88] This examination illustrates the panel's careful consideration of the constitutional ramifications of applying the rape shield statute.

The trial court, the Indiana Supreme Court majority, and the federal district court did not examine this critical issue closely enough. A careful inspection would have produced a showing that previous applications of the rape shield statute began with the assumption that since the statute is constitutional on its face and because the policies behind it are constitutional,[89] then it must also be constitutionally permissible to begin the balancing test with a presumption that the victim's interest will always outweigh the defendant's interest. From this presumption, the defendant is forced to show that his interest so far outweighs the victim's interest that he can overcome the presumption in favor of the victim *and* still tip the balance in favor of his interest. This application would clearly violate the Constitution.

Up to this point in the litigation, no court had addressed this issue. Even the dissent at the state supreme court level did not address this issue fully. The Indiana Supreme Court dissent recognized that by not letting the accused testify on his own behalf, his Constitutional rights were violated. However, the constitutional relationship to the application of the rape shield statute was never explored. On January 6, 1994, the Seventh Circuit Court of Appeals, sitting en banc, handed down a 6-5 decision that affirmed the federal district court's denial of Stephens' petition for writ of habeas corpus.[90] The majority decided that since Stephens was able to partially testify as to what happened on the night in question and because he was permitted to say that he said something to Wilburn that angered her, this was enough to preserve the defendant's constitutional rights.[91] In fact, the majority stated that "[t]he Constitution requires no more than this."[92] The en banc panel's decision suggests that the presumption in favor of the victim is so strong that even the Constitution can not trump it. For justification, the majority reasoned that "[t]he jury was entitled to credit Wilburn's story, discount Stephens' account, and return a guilty verdict."[93] Ordinarily this would be true. Applying the rape shield statute, however, alters the perspective from which this assumption is made. The jury is entitled to credit the victim's story and discount the defendant's story provided that both parties start on equal footing when telling their account

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84. *Id.* at 268 (citing Rock v. Arkansas, 483 U.S. 44 (1987) and Chambers v. Mississippi, 410 U.S. 284 (1973)).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*; *See* U.S. CONST. amend. V.

89. *See supra* notes 39-50 and accompanying text.

90. Stephens v. Miller, 13 F.3d 998, 998-99 (7th Cir. 1994).

91. *Id.* at 1002.

92. *Id.*

93. *Id.* at 1002-03.

of the incident. The rape shield statute currently operates to ensure that the victim starts with an advantage when presenting evidence to the jury with its wholesale preclusion of certain portions of the defendant's testimony. In order for the defendant to prevail, he must introduce evidence that overcomes the advantage the victim has, plus offer enough additional evidence to tip the balance in his favor. It is this initial inequality that renders application of the rape shield statute unconstitutional, not the underpinning of the policies of the statute which are aimed at protecting the victim from harassment and embarrassment. The trial court in *Stephens v. Miller* never considered this portion of the analysis.

Judge Flaum's concurrence[94] came close to this issue by looking to the Supreme Court for guidance on how to apply the balancing test in rape shield cases.[95] He concluded that the Court has not offered a clear standard for determining when a victim's interest outweighs the accused's interest.[96] Nevertheless, Judge Flaum tried to infer such a standard. This inference was derived from the Court's recent cases involving rape shield statutes and Sixth Amendment jurisprudence.[97] The problem with this approach is that the question of the constitutionality of application will not be answered every time the Seventh Circuit analyzes rape shield cases. In fact, the court has never addressed this particular issue concerning rape shield statutes. Judge Flaum was led to the conclusion that the legal trend denies the defendant unchecked freedom to present evidence.[98] Again, this analysis misses the crucial point as to the appropriate time to ask the necessary constitutional question. It is meaningless to consider constitutional issues after the balancing test has been performed, or even while the balancing test is taking place. Rather, the constitutional issue as to whether the parties have equal chances to prevail in the litigation arises at the starting point of the analysis. Courts too often by-pass this question and prematurely treat the issue of balancing the competing interests involved. This creates a situation that forces a defendant to build a defense without the essential tools he needs.

The dissenting opinions to the en banc majority recognized the constitutional violation in the *Stephens* case.[99] Judge Cummings' dissent announced the constitutional need for an even footing between victim and defendant from the outset of the presentation of evidence:

> [T]he desire to shield rape victims from harassment must yield in certain cases to another vital goal, the accused's right to present his defense. Sending the innocent to jail, or depriving the guilty of due process, is not a price our Constitution allows us to pay for the legitimate and worthy ambition to protect those already victimized from additional suffering.[100]

This statement illustrates Judge Cummings' acknowledgment of the constitutionality of the rape shield statutes and the constitutionality of the policies behind them. However, he recognizes that the constitutional application of the statute presents a different issue altogether. In order to apply the law without violating the Constitution, it is imperative not

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94. *Id.* at 1003 (Flaum, J., concurring).
95. *Id.* at 1004.
96. *Id.*
97. *Id.* at 1004-05.
98. *Id.*
99. *Id.* at 1009-25 (Cummings, J., Cudahy, J., Coffey, J., Ripple, J., dissenting).
100. *Id.* at 1010.

to place one party at an advantage over another party before the trial begins. Judge Cummings implies that this inequality occurs with the application of rape shield statutes because of the social and political pressure to make amends for the suffering and humiliation that rape victims have already endured.

The *Stephens* litigation epitomizes the tension that is mounting on the issue of the constitutional consequences of unqualified application of rape shield statutes. In light of the sophisticated procedural history of the *Stephens* case, the time has arrived for the United States Supreme Court to resolve this issue.[101] If the High Court does grant Stephens a writ of certiorari, then it must consider several arguments regarding the future of the current model of the rape shield statute. However, if the Court does not grant Stephens' request, another defendant will certainly emerge and require the Court to address this issue.

IV. Arguments Pertinent to a Constitutional Review of Rape Shield Statutes by the Supreme Court

The Supreme Court will examine a number of arguments when considering the constitutional issue implicated in the application of the rape shield statute. These arguments justify the need to place victims and defendants on equal footing before balancing their competing interests.

A. *Textualist Argument*

The structure of the textualist argument is built on the Constitution and the undeniable content of the Sixth and Fourteenth Amendments. The Fourteenth Amendment, in concert with the Sixth Amendment guarantees a criminal defendant compulsory process for obtaining witnesses in his favor[102] in order to avoid depriving him of life, liberty, or property without due process of law.[103] These amendments are interpreted to afford the criminal defendant the right to testify in his own defense.[104] However, the Court has ruled that a criminal defendant's right to testify is not unlimited.[105] This contrary holding creates the tension between the state and the victim's interests and the rape defendant's interests.

The textualist argument operates to prevent the Court from arriving at the point where it must administer the balancing test in order to determine whether evidence will be admitted. The most important supporter of this argument is Justice Scalia, who wrote a strong textualist dissent in *Maryland v. Craig*, a case which dealt with the defendant's Sixth Amendment right to compulsory process.[106] In *Craig*, the sharply divided Court called for a continuation of the balancing test between the State's interests and the defendant's interests.[107] However,

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101. *See supra* notes 1-13 and accompanying text. *See generally* Barb Albert, *Appeals Court Upholds State's Rape Shield Laws*, Indpls. Star, Jan. 8, 1994, at A1 (reporting that Stephens' attorney plans on asking the Supreme Court to hear the case).

102. *See supra* note 11.

103. *See supra* note 11.

104. Michigan v. Lucas, 500 U.S. 145, 149 (1991).

105. *Id.* at 152 (citing Taylor v. Illinois, 484 U.S. 400 (1988)).

106. Maryland v. Craig, 497 U.S. 836 (1990) (Scalia, J., Brennan, J., Marshall, J., Stevens, J., dissenting).

107. *Id.* at 860-61 (holding that the Sixth Amendment did not categorically prohibit a child witness in a child abuse case from testifying outside the defendant's physical presence using one-way circuit television).

Scalia argued that the Sixth Amendment provides, with unmistakable clarity, that a criminal defendant has the right to confront the witness against him.[108] Scalia asserted that "[t]he purpose of enshrining this protection in the Constitution was to assure that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court."[109]

The thrust of Scalia's argument soundly applies to the situation surrounding the enactment of rape shield statutes. The purpose of rape shield statutes works to change the social and political beliefs about rape and to effect changes in the substantive legal definition coupled with the methods used to prosecute the crime.[110] This legal evolution is a perfect example of the changing tide of policy interests that are pursued by statutory law. In order for Constitutional rights to remain inviolate, the document must take precedence over the prevailing social and political thought. Otherwise, no citizen is secure in the notion that his or her rights and obligations are absolute, but rather he or she must live in fear of being stereotyped as a member of the group that is currently receiving social and political disfavor.

B. *Truth-Finding Argument*

The truth-finding argument relies on the idea that certain rights exercised in a criminal proceeding are truth-impairing rights while others are truth-furthering rights.[111] Truth-impairing rights are those that withhold relevant evidence from the trier of fact during the guilt-innocence phase of the criminal proceeding.[112] An example of a truth-impairing right is the Fifth Amendment privilege against self-incrimination.[113] The Court has held that in order to purify the guilt-innocence phase of adjudication, truth-impairing rights must be interpreted strictly.[114] Truth-impairing rights are construed narrowly to further the quest for truth in a criminal proceeding. Therefore, it would be logical to assume that truth-furthering rights would be encouraged by the Court and the interpretation of such rights would be liberal. However, this is not the case.

A truth-furthering right is one that, in theory, purifies the guilt-innocence phase of criminal adjudication by arming the trier of fact with a more complete version of the truth. This type of right can hardly be considered as running counter to society's interest in fair adjudication. Examples of truth-furthering rights include the right to present exculpatory evidence, the right to confront adverse witnesses, and the right to have guilt proven beyond a reasonable doubt.[115] The Court attaches importance to truth-furthering rights, but only after considering other countervailing interests involved in the proceeding. For example, the interests of the victim and the State are weighed against the defendant's rights to further the truth by presenting exculpatory evidence. This application inhibits the Court's pursuit of truth and fair adjudication in the criminal proceeding.

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108. *Id.* at 861 n.3.

109. *Id.*

110. *See supra* note 35 and accompanying text.

111. Tom Stacy, *The Search For Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1370-71 (1991).

112. *Id.*

113. *Id.* at 1371 n.6.

114. *Id.* at 1370 n.5.

115. *Id.* at 1371 n.6.

This inconsistency has significant implications when considering the purpose of the criminal justice system and doctrines upon which it was founded. One of the founding principles of the justice system is that a defendant is innocent until proven guilty. From this dogma flowed the concept that the gravest mistake that the justice system could make would be to wrongly punish an innocent person. With this integrity, the courts tried cases and administered procedures that would advance this priority. However, the modern courtroom is no longer built on the foundation of innocent until proven guilty.

Judge Ripple's dissent to the Seventh Circuit en banc majority alludes to this betrayal. He states that "[t]oday's decision will no doubt be hailed as a very 'contemporary' one. However, the correctness of a ruling by Judges of the Third Article is not measured by whether it is 'contemporary' but by whether it protects the basic constitutional values that undergird our political and legal order."[116] When writing of the decision in *Stephens*, Ripple opined that the majority's holding "condones an injustice that raises the distinct possibility that an innocent person has been convicted of a most heinous crime."[117] This statement is faithful to the anchoring principles of our Constitution, while the modern application of rape shield statutes has created an environment in which truth-furthering rights are strangled. The consequences of such a situation could result in destruction of this nation's most revered presumption of innocence.

C. *Judicial Dishonesty Argument*

The United States Supreme Court should also address the frightening frequency with which the lower courts have denied the existence of a Sixth Amendment violation when the defendant is not able to present exculpatory evidence. Blind adherence to a state statute is not a sufficient confrontation with the constitutional issues that are implicated by application of rape shield statutes. For example, the courts in *Stephens* justified their rulings in favor of the victim by declaring that the trial court properly balanced Stephens' right to testify with the State and the victim's interest in precluding the evidence.[118]

The court is simply not honest with itself by ignoring the constitutional violation. The court would be more honest if it admitted that, although there may be a violation, the facts of the case reveal that the violation is either harmless or not weighty enough to overcome the harm to the victim. However, the court never enters into this analysis. This avoidance creates the constitutional violation in applying an otherwise constitutional rape shield statute.

D. *Redefining Competing Interests Argument*

Another consideration for the Court in determining the constitutionality of the application of rape shield statutes is the method of defining the interests that are involved in the balancing test.[119] The balancing test will not yield constitutional results unless the quantities being measured are determined constitutionally. Therefore, one must examine the derivation of the state and victim's interests, as well as defendant's interests. The case law is clear that the victim's interests include protection from harassment and embarrassment.

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116. Stephens v. Miller, 13 F.3d 998, 1019 (7th Cir. 1994).

117. *Id.*

118. *Id.* at 1002.

119. Michigan v. Lucas, 500 U.S. 145, 149 (1991).

The victim is also able to count on the governmental interests of encouraging the reporting of sex offenses and gaining convictions.[120]

However, the case law does not suggest that the rape defendant has that same privilege. The rape defendant's interests are located in his ability to exercise his constitutional rights in order to preserve his liberty. But, the case law indicates that these rights are not absolute and may be infringed upon when legitimate governmental interests so require.[121] Moreover, he is not able to include, in the calculation of his interest, society's interest in preserving individual liberty by holding the rape defendant's constitutional rights inviolate. This becomes a grave miscalculation when one considers society's growing interest in relying on the legal definition of consensual and non-consensual sexual intercourse, as well as the need for future rape defendants to be able to predict the consequences of their behavior. This inequality harms rape defendants, as well as society at large. Without recognizing this element on the side of the defendant, the victim is almost assured of prevailing at trial.

E. *Other Considerations*

If the Court upholds the application of the rape shield statute in *Stephens*, then it will allow other social and political problems to persist in addition to the legal spill-over from the constitutional issue. First, since the statute precludes evidence offered by the rape defendant, he is placed in a weaker position than the victim in terms of ability to present a case. This procedure is the result of a choice made by the statute, via the legislature, in favor of the victim. This choice, in effect, discriminates against the rape defendant. The discrimination is not necessarily harmful until the preclusion impedes the defendant from constructing his defense. When this occurs, the choice becomes harmful. The discrimination that is inflicted upon the defendant could be justified by the suffering and harmful discrimination that the female victim has encountered for centuries in search of a fair rape trial. However, this argument contradicts the purpose espoused by the rape shield statute to bring equality to the courtroom during rape trial proceedings.[122] Displacing the harm from the victim onto the defendant does not entirely fulfill the mission of the statute. Moreover, it does not seem fair to "punish" an individual defendant for systematic problems.

The Court could solve this problem by leveling the playing field in terms of the admissibility of the evidence that the defendant offers. Both parties should be allowed to fully tell their own side of the story as it is relevant to the issues in the case. In pursuit of purifying the guilt-innocence phase of the criminal proceeding, as well as equalizing the process, the Court could allow for special instructions as to what the jury should consider and what relative weight the jury should give to this evidence. But by no means should the jury be prevented from hearing the whole story.

Another problem that would persist if the Court upholds the existing application of the rape shield statute is the perpetuation of gender stereotypes. In the quest for a fair and less traumatic rape trial for victims, the rape shield statute was intended to eradicate the traditional misconceptions of rape[123] which held that victims were "asking for it" or

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120. *Id.* at 146.

121. *Id.* at 152-53.

122. *See supra* note 35.

123. *See supra* notes 31-34 and accompanying text.

"advertising for it."[124] However, by precluding evidence, the legislature is endorsing the stereotype or misconception that the powerless, dependent, female victim needs protection from the barbaric, primitive, male attacker. To assert that there might be a better way of equalizing the genders may be naive; however, protectionist legislation does not cure the evil of inequality. Instead, it produces resentment and further controversy.

These social and philosophical considerations may play into the Court's final decision; however, the reality is that they probably will not make much difference. Nevertheless, these types of inquiries will remain after the Court pronounces its ruling. These are the issues that individual members of society must square with their own value systems and the ideology of their daily lives. Rape is a problem that has endured throughout history. Once again society has arrived at a point in its existence where it must articulate its position on the issue.

Conclusion

The social and political dynamics that have shaped the twentieth century have certainly had a radical effect on rape shield legislation. These statutes, although noble in purpose and constitutional in theory, are applied in a way that is unconstitutional. The balancing test announced in *Lucas* deceives our Sixth Amendment jurisprudence by pretending that the rape defendant has an equal chance to prevail at trial because his interests are being considered. In reality, legislatures have created a presumption in favor of the rape victim that is so strong that even our Constitution can not overcome it.

While it is easy to see why rape shield legislation emerged, it is distressing to contemplate the far- reaching effects of the statutes. Rape shield statutes call into question the constitutional foundation upon which the criminal defendant builds a defense.

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124. *See supra* notes 31-34 and accompanying text.

Sister-State Recognition of Valid Same-Sex Marriages *Baehr v. Lewin*–How Will It Play in Peoria?*

Candace L. Sage**

Only twenty-five years ago . . . it was a crime for a black woman to marry a white man. Perhaps twenty-five years from now we will find it just as incredible that two people of the same sex were not entitled to legally commit themselves to each other. Love and commitment are rare enough; it seems absurd to thwart them in any guise.

Anna Quindlen[1]

Introduction

Catherine and Dorothy live in Hawaii. They meet, fall in love, and decide to spend the rest of their lives together. Wishing to formalize their private commitment to each other, Catherine and Dorothy obtain a marriage license, and are wed on Waikiki beach. Among the wedding guests are Steve and John, a couple who have flown in from California for the occasion. Inspired by the ceremony, Steve and John also obtain a marriage license issued by the State of Hawaii and are married in Hawaii before returning to the mainland. After their wedding, Catherine and Dorothy inform their respective employers of their marriage. Dorothy adds Catherine to her company's health care plan as her spouse, and they file a joint federal tax return at the end of the year. Although the preceding story is fictional, it accurately portrays what may become legally achievable as a result of the groundbreaking ruling in *Baehr v. Lewin.*[2]

The Hawaii Supreme Court ruled in *Baehr* that the statute limiting marriage to opposite-sex couples may violate the state's constitutional guarantee of equal protection on the basis of sex.[3] The court reinstated a lawsuit against the Hawaii Department of Health that was instituted by same-sex couples who were seeking to marry. On remand, the state will be required to show that continuing to deny same-sex couples marriage licenses is "justified by compelling state interests."[4] The court declined to treat the case as a matter of privacy rights, equal protection of homosexuals, or the right of same-sex couples to marry. Noting that sexual orientation is irrelevant to the issue of same-sex marriage, the court observed that "[p]arties to a same-sex marriage could theoretically be either homosexuals or heterosexuals."[5] The issue is whether the "state's regulation of access to the status of

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1. Anna Quindlen, Thinking Out Loud 35 (1993).

2. 852 P.2d 44 (Haw. 1993).

3. *See* Haw. Const. art. I, § 5. This section provides: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."

4. *Baehr*, 852 P.2d at 67.

5. *Id.* at 51 n.11.

married persons, on the basis of the applicants' sex,"[6] denies same-sex couples the equal protection of the laws. In other words, the question is whether allowing a man to marry a woman, but not allowing a woman to marry a woman, is a form of sex discrimination. Because the state's denial of access to marriage by same-sex couples is presumptively unconstitutional, if the state fails to carry its substantial burden of showing a "compelling state interest," same-sex marriages will be legally available in Hawaii.[7]

What effect will be given to the legally-sanctioned marriages of the characters in the scenario described at the beginning of this Note? If Catherine and Dorothy remain in Hawaii, they presumably will have full access to all the rights and obligations conferred upon married persons. These rights include the right to any benefits extended to spouses by employers, insurance companies, or other organizations; the right to the spouse's elective share of an estate; the right to maintain a wrongful death action as the surviving spouse; and numerous tax advantages. But what if Catherine and Dorothy leave Hawaii and move to Illinois, Ohio, Alabama, or any other state? Will the rights that they enjoy as married persons in Hawaii be recognized in another state? What rights will Steve and John have upon their return to California pursuant to their marriage in Hawaii? Will their marriage be recognized as valid in California?

This Note explores the possible outcomes of validly-married same-sex couples seeking recognition of their marriages from other states. Part I discusses state recognition of foreign marriages and the public policy exception as traditionally applied to deny recognition. Part II reviews the case history of the application of the public policy exception to marriages involving incest, polygamy, nonage (marriages involving minors), and miscegeny (mixed-race marriages). Part III discusses the prospective application of the public policy exception to same-sex marriages. Finally, this Note briefly concludes by proposing the circumstances under which same-sex marriages will be afforded recognition by sister states and by noting the parallels between the struggle for acceptance of same-sex marriages and the struggle for acceptance of mixed-race marriages.

I. Recognition of Foreign Marriages

A. The General Rule

In general, a marriage will be recognized as valid in any state if it is valid under the laws of the state in which it is contracted.[8] If a marriage is valid where made, it is generally recognized as valid in every other jurisdiction.[9] Thus, the marriage of *A* and *B* in State *X* will be recognized in State *Y*, with limited exceptions.[10] This rule applies regardless of the domiciles of the parties. Consequently, if the general rule is followed, any marriage contracted in Hawaii, valid under its laws, by parties residing either there or elsewhere, is valid and recognizable in any other state.

Interstate recognition of marriages exists not merely as a matter of comity, but also because public policy favors predictability, certainty, and uniformity of result in protecting

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6. *Id.* at 60.
7. *See supra* note 4 and accompanying text.
8. 52 Am. Jur. 2d *Marriage* § 80 (1970).
9. Loughran v. Loughran, 292 U.S. 216, 223 (1934).
10. *See infra* subpart I.C.

the justified expectation of the parties.[11] If the marriage is recognized as valid, a couple who has wed outside the forum state need not fear criminal sanctions being imposed for violation of state laws prohibiting cohabitation or fornication. The legitimacy of any children born to the couple after the marriage is clearly established. The parties can rely on the property rights that arise from their marital status to produce predictable results. The multiplicity of rights, benefits, and obligations that are contingent upon the legal status of marriage depends on the validity of the marriage in question.

In addition, recognition of sister-state marriages is favored for reasons of judicial economy. Without such recognition, court dockets would be clogged with petitions to determine the validity of marriages, especially in today's highly mobile society. The ability of a married couple to move from one state to another without disturbing the couple's marital status or without forcing the couple to obtain a judicial decree affirming that status supports one of this country's basic freedoms–the unrestricted freedom of movement between and among the states. Application of the rule also affords ease in the judicial determination of validity when that question must be addressed by a court. The only issue to be resolved is whether the marriage was valid according to the laws of the contracting state. No inquiry into the effect of differences between the laws of the contracting state and local marriage laws is necessary.

B. Validation Statutes and Evasion Statutes

Some states have enacted validation statutes codifying the general rule that marriages valid where contracted are valid in all other jurisdictions.[12] Although there are some differences in language which may be significant,[13] the acts codify the general rule that recognizes the validity of a marriage, "even if the parties to the marriage would not have been permitted to marry in the state of their domicil."[14] However, some states have engrafted, by judicial interpretation, a requirement that the marriage in question not violate the public policy of the forum state.[15] Also, a question remains whether a state that has enacted the Uniform Marriage and Divorce Act's validation statute will forego applying prior

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11. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283 cmt. b (1969) [hereinafter RESTATEMENT].

12. *See, e.g.*, CAL. FAM. CODE § 308 (West 1994); IDAHO CODE § 32-209 (1983); KAN. STAT. ANN. § 23-115 (1988); KY. REV. STAT. ANN. § 402.040 (Michie/Bobbs-Merrill 1984); NEB. REV. STAT. § 42-117 (1988); UNIF. MARRIAGE AND DIVORCE Act § 210 (1973) (§ 210 adopted by Arizona, Colorado, Illinois, Minnesota, Missouri, and Washington).

13. Most states use some slight variation on the language used in California's act ("A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state." CAL. FAM. CODE § 308. (West 1994)). However, Kentucky's act is limited by its terms to residents who marry out of state, leaving open the question of recognition for marriages performed out of state by non-residents ("If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized." KY. REV. STAT. ANN. § 402.040. (Michie/Bobbs-Merrill 1984)).

14. UNIF. MARRIAGE AND DIVORCE ACT § 210 cmt.

15. *See* Estate of Loughmiller, 629 P.2d 156 (Kan. 1981) (exceptions to the statute if the marriage is polygamous, incestuous, or prohibited by the state for public policy reasons); *In re* Takahashi's Estate, 129 P.2d 217 (Mont. 1942) (statute declaring miscegenic marriages null and void limits application of the validation statute).

authority decided under a previous act that codified exceptions.[16]

Alternatively, other states have enacted evasion statutes to limit recognition of out-of-state marriages by residents to those that would be valid under the laws of the forum.[17] Evasion statutes reflect the view, endorsed by the *Restatement (Second) of Conflict of Laws*,[18] that the marriage is subject to the policies of the state with the dominant interest in the issue in question.[19] By enacting an evasion statute, a state asserts that its right to control the marital status of its citizens extends beyond its geographic boundaries.[20] By contrast, some states have expressly refused to give extraterritorial effect to local state law.[21] Enacting an evasion statute also implies a state's strong interest in implementing its own policies and its disregard for the policies of the contracting state.[22] But even in the absence of evasion statutes, states have applied the exception to the general rule in order to invalidate marriages that violate the public policy of the forum, particularly in cases where one or more of the parties is a domiciliary of the forum.[23]

C. The Public Policy Exception

Where a marriage made out of state contravenes a strong public policy of the forum, a public policy exception allows the forum to refuse to recognize the marriage. Statutes that declare certain marriages void or impose criminal sanctions on those attempting to contract such marriages, as well as widely applied common law prohibitions (such as those against incest and polygamy), are indicative of the strong public policy of a state.[24] The strength of a state's interest in implementing its policy choices is related to the methods by which the state has indicated those choices. Statutes declaring a particular marriage void or criminal are perhaps the strongest indicators. A critical element in applying the exception is the domicile of the parties at the time the marriage was contracted. A state's interest in applying its own policy choices is highest when both parties reside in the forum state and lowest when neither party is a resident. When the domiciles of the parties are mixed, the results tend to be mixed as well.

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16. *See* Payne v. Payne, 214 P.2d 495 (Colo. 1950) (prior Colorado law excepted bigamous and polygamous marriages from the operation of its validation statute).

17. *E.g.*, MASS. GEN. LAWS ANN. ch. 207, § 10 (West 1987); N.D. CENT. CODE § 14-03-08 (1991); W. VA. CODE § 48-1-17 (1992).

18. RESTATEMENT, *supra* note 11, § 283. Section 283 reads:

> (1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.
>
> (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

19. *Id.* cmt. b.

20. State v. Tutty, 41 F. 753 (C.C.S.D. Ga. 1890).

21. *See, e.g.*, Stevenson v. Gray, 56 Ky. 193, 211 (1856) (statute prohibiting marriage between a nephew and his uncle's widow did not invalidate the marriage, contracted out-of-state, between two Kentucky residents).

22. *Id.*

23. *See infra* Part II.

24. *See generally* 52 AM. JUR. 2D *Marriage* § 82 (1970).

Analysis of the cases discussed in this Note indicates that the next consideration when a marriage is challenged on public policy grounds is the nature of the prohibited conduct. Whether a particular state will find a marriage invalid as contravening local public policy is not readily predictable. In addition to the questions of domicile and the nature of the conduct, the results of applying the exception frequently turn on whether the parties are both alive and before the court or whether the marriage has terminated by the death of one or both of the parties. The state's interest in enforcing its policy choices is highest when confronted with affording a couple all the incidents that accrue to the marital state and is lowest when the marriage has lost its vitality and only survivor rights are at stake.[25]

Marriages that are incestuous (between parties in the direct line of consanguinity or between closely-related collaterals, such as brothers and sisters) have been universally refused recognition on the grounds that they are contrary to public policy.[26] Statutory prohibitions against marriage between parties more remotely related, such as between an uncle and his niece or between first cousins, have formed the basis for asserting the invalidity of a marriage by application of the exception.[27] Generally, analysis of the cases discussed in this Note indicates that first-cousin marriages have been recognized as valid when at least one of the parties was not a resident of the forum at the time the marriage was contracted. When both parties are residents, a first-cousin marriage may violate a state's evasion statute and thus be invalidated, even when only survivor rights were concerned.[28] Marriages between an uncle and his niece, being within a closer degree of consanguinity than first-cousin marriages and prohibited in all states, have generated mixed results when the validity of the marriage has been questioned, regardless of the vitality of the parties.[29]

Polygamous marriages are also banned in all states as offensive to public policy.[30] Although polygamous marriages of Native Americans have been recognized for all purposes,[31] such marriages between domiciliaries of a foreign country have been recognized only for purposes of succession.[32]

Some states also apply the exception to marriages which violate state requirements concerning the minimum age at which a party is permitted to contract a marriage. In the cases reviewed in this Note where nonage was the issue, all the parties were living. Because of the state's heightened interest in imposing its policy choices on living persons, it might be expected that these cases would illustrate strict enforcement of nonage laws. However, in many jurisdictions, the public policy of the state dictating the age of consent to marry is not strong enough to justify invalidating a marriage where one of the parties is underage, even when both parties are residents of the local forum.[33]

Before the Supreme Court struck down miscegeny laws as an unconstitutional

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25. *See generally* RESTATEMENT, *supra* note 11, § 283 cmts. i-k.

26. 52 AM. JUR. 2D *Marriage* § 63 (1970).

27. *See infra* subparts II.A.1 and II.B.1.

28. *See, e.g.*, *In re* Mortenson's Estate, 316 P.2d 1106 (Ariz. 1957).

29. *See, e.g.*, Campione v. Campione, 107 N.Y.S.2d 170 (N.Y. Sup. Ct. 1951); Catalano v. Catalano, 170 A.2d 726 (Conn. 1961).

30. 52 AM. JUR. 2D *Marriage* § 67 (1970).

31. *See, e.g.*, Hallowell v. Commons, 210 F. 793 (8th Cir. 1914), *aff'd*, 239 U.S. 506 (1916).

32. *See infra* subpart II.A.3.

33. *See infra* subparts II.A.2 and II.B.2.

infringement of a "fundamental freedom,"[34] such laws were frequently the basis for refusal to recognize out-of-state marriages for reasons of public policy. Generally, the strength of the state's policy against miscegenic marriage was insufficient to require invalidation of the marriage by extending its application to non-residents, regardless of the vitality of the parties.[35] However, the policy was vigorously applied in refusing to recognize the miscegenic marriage of forum residents, even when the issue was succession.[36]

The public policy exception is likely to be invoked to invalidate same-sex marriages when couples seek recognition of their Hawaiian marriages in other states. Although some courts have recognized certain rights of same-sex couples, such as the right to adopt the partner's child[37] and the right to retain an apartment lease as a qualified surviving "family" member upon the tenant's death,[38] no court in the United States has recognized the rights of same-sex couples to occupy the marital status.[39] A logical implication of this failure is that courts will tend to resist efforts to extend recognition of valid same-sex marriages by applying the public policy exception. Whether same-sex couples can resist invalidation of their marriages on public policy grounds will depend on the same factors used in applying the exception to incestuous, polygamous, underage, and miscegenic marriages: the domiciles of the parties at the time the marriage was contracted; the strength of the policy as evidenced by statutes prohibiting the conduct in question and by judicial interpretation of the measure and extent of that strength; and the vitality of the parties to the marriage.

II. History of the Application of the Public Policy Exception

A. Both Parties Domiciliaries of the Contracting Forum

1. Incest.—One reported case addressed the issue of whether to recognize a marriage between persons within the degree of consanguinity which the laws of the non-contracting state declared incestuous. In *Garcia v. Garcia*,[40] the parties were first cousins and were both citizens and residents of California when they married there.[41] Upholding the lower court's dismissal of an action for annulment, the Supreme Court of South Dakota refused to give extraterritorial effect to its own laws, which declared marriages between cousins void and subject to criminal prosecution.[42] The court held that the marriage, "valid in the state where it was contracted, is to be regarded as valid in this state."[43] It noted that South Dakota marriage law "cannot properly be held to apply to marriages contracted in other states, legal and valid where contracted, and where, as in this state, there is no provision in our Code authorizing our courts to declare such marriage legally contracted in another state void in this

34. Loving v. Virginia, 388 U.S. 1, 12 (1967).

35. *See infra* subpart II.A.4.

36. *See infra* subpart II.B.3.

37. *See In re* Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).

38. *See* Braschi v. Stahl Assoc. Co., 543 N.E.2d 49 (N.Y. 1989).

39. *See infra* subpart III.B.

40. 127 N.W. 586 (S.D. 1910).

41. *Id.* at 587.

42. *Id.* at 589.

43. *Id.*

state."[44]

The court's acceptance of the applicability of the rule in this case was based on two factors: (1) the marriage was not against "the generally accepted opinions of Christendom" (not being within the direct line of consanguinity or between brothers and sisters); and (2) the legislature had not provided that such marriages in other states might be declared void by the courts of South Dakota.[45] The question remains, then, whether a same-sex marriage would be invalidated on the basis that it was either against the "opinions of Christendom" or against a legislative enactment authorizing such invalidation. As to the former, it is unlikely that a court would wish to incur an Establishment Clause[46] challenge by basing its decision on so-called "Christian" principles. The latter situation (a statute giving extraterritorial effect by authorizing invalidation) provides a possible avenue for avoiding recognition of same-sex marriages. However, no American court has invalidated a marriage which was validly contracted in another American state by parties domiciled there.[47]

2. Underage.—Courts have refused to invalidate marriages contracted outside the forum because the parties were underage. A New York appellate court declined to hear an action to annul a marriage, validly contracted between residents of the British West Indies in their place of domicile, upon the parties becoming residents of New York.[48] In affirming the lower court's dismissal on jurisdictional grounds, the appellate court held that New York courts:

> have no power to annul and declare invalid ab initio a marriage contracted in another state or country between two actual bona fide residents, and citizens or subjects, of such state or country, when the marriage was by the laws of such state or country valid when and where it was performed.[49]

Similarly, an Ohio appellate court refused to invalidate a marriage performed in Pennsylvania between two of its residents, one of whom was underage, because Pennsylvania courts would not have invalidated the marriage on the grounds of nonage.[50]

3. Polygamy.—The cases addressing the issue of polygamy without exception involve parties validly married in foreign countries (no American state permits a polygamous union). In actions regarding the descent of property, courts have granted the right of succession to surviving spouses of a polygamous marriage. As noted by a California appellate court, the public policy of the state in prohibiting polygamous marriages would apply only if the parties attempted to cohabit within the state and such policy would not be affected by dividing the decedent's estate between his surviving wives.[51]

Polygamous marriages of foreign nationals, however, have been held invalid when the parties are living. A New York court held that a Nigerian national could not raise, as a

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44. *Id.*

45. *Id.*

46. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").

47. RESTATEMENT, *supra* note 11, § 283 Reporter's Note cmts. j-k.

48. Simmons v. Simmons, 203 N.Y.S. 215 (N.Y. App. Div. 1924).

49. *Id.* at 220.

50. Abbott v. Industrial Comm'n, 74 N.E.2d 625, 628 (Ohio Ct. App. 1946).

51. *In re* Dalip Singh Bir's Estate, 188 P.2d 499, 502 (Cal. Ct. App. 1948).

defense to the charge of second-degree rape, his marriage to the complainant, whom he claimed as his "'second' or 'junior' wife."[52] The defendant was already legally married to another at the time of his "marriage" to the complainant in Nigeria, which allows polygamous marriages. Citing a statutory provision declaring a bigamous marriage "absolutely void," the court declared that "a polygamous marriage legally consummated in a foreign country will be held invalid in New York."[53]

Application of the public policy exception to same-sex marriage by analogy to polygamous marriages is unlikely, given that the polygamy exception applies exclusively to residents of foreign countries. The analogy fails when applied to a valid same-sex marriage contracted in the United States by U.S. citizens.

4. Miscegeny.—In applying the public policy exception to cases involving miscegeny, the courts have uniformly recognized out-of-state marriages for purposes of granting the right to succession.[54] The Supreme Court of Florida found inapplicable an antimiscegenic provision in the state constitution and antimiscegenic statutes, and refused to invalidate a mixed-race marriage so as to prevent the surviving spouse from inheriting property in Florida, a state in which the marriage would have been invalid.[55] The couple were both residents of Kansas when they married there, and had remained in Kansas until the death of the wife.[56]

Similarly, the Supreme Court of Louisiana was asked to invalidate the Spanish marriage in Havana of a mixed-race couple, which would have prevented legitimization of their daughter, born while the couple was unmarried and living in Louisiana, and prevented her inheritance of her father's estate.[57] However, the court refused, noting that Louisiana law, which prohibited miscegenic marriages, applied "to parties living in Louisiana who had anywhere contracted the kind of marriage not permitted by its policy," and "would not have recognized as valid in Louisiana the marriage of Caballero in Havana."[58] The Supreme Court of Mississippi also limited the reach of its antimiscegenic laws to parties living in Mississippi when it recognized the marriage in Illinois of Illinois residents "to the extent only of permitting one of the parties thereto to inherit from the other property in Mississippi."[59]

The Supreme Court of California, however, fully accepted the validity of a miscegenic marriage, prohibited under California law, validly contracted in Utah by Utah residents who subsequently moved to California.[60] Although the case involved intestate succession, the court indicated that all the incidents of marriage would be recognized in California. The court cited a state statute which provided that "all marriages contracted without the State, which would be valid by the laws of the country in which the same were contracted, shall be

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52. People v. Ezeonu, 588 N.Y.S.2d 116, 118 (N.Y. Sup. Ct. 1992).

53. *Id.* at 117.

54. *See, e.g.*, Whittington v. McCaskill, 61 So. 236 (Fla. 1913); Caballero v. Executor, 24 La. Ann. 573 (1872); Miller v. Lucks, 36 So. 2d 140 (Miss. 1948); Pearson v. Pearson, 51 Cal. 120 (1875).

55. *Whittington*, 61 So. at 237.

56. *Id.* at 236.

57. *Caballero*, 24 La. Ann. at 575.

58. *Id.*

59. Miller v. Lucks, 36 So. 2d 140, 142 (Miss. 1948).

60. Pearson v. Pearson, 51 Cal. 120, 125 (1875).

valid in all courts and places within the State."[61] By stating the rule that "[t]he validity of a marriage (except it be polygamous or incestuous) is to be tested by the law of the place where it is celebrated,"[62] the court implied that it would recognize for all purposes the miscegenic marriage of living persons.

Results were mixed when courts were asked to invalidate out-of-state marriages and hold cohabiting couples liable for violating local antimiscegenic statutes.[63] The Tennessee Supreme Court in *Bell* held that it was an indictable offense for a man to live in Tennessee with his wife, whom he validly married in Mississippi, in violation of the antimiscegenic laws of Tennessee.[64] The court limited the applicability of the rule that "a marriage good in the place where made . . . shall be good everywhere" to recognition of out-of-state marriages where only the ceremonial formalities differed from the forum.[65] Stating that "[e]ach State . . . cannot be subjected to the recognition of a fact or act contravening its public policy and against good morals, as lawful, because it was made or existed in a State having no prohibition against it or even permitting it,"[66] the court placed miscegeny on par with polygamy, incest between parent and child, and incest between siblings as being "revolting" and "unnatural."[67]

However, the Supreme Court of North Carolina refused to find a couple, validly married in South Carolina, guilty of fornication and adultery.[68] Even though the law of North Carolina prohibited miscegenic marriages, the court found that it was "compelled to say that this marriage being valid in the State where the parties were bona fide domiciled at the time of the contract must be regarded as subsisting after their immigration here."[69] The court reasoned that affording sister-state recognition of validly contracted marriages promotes uniformity of laws and avoids numerous inconveniences, and that those advantages outweighed the difficulty of subjecting the people of North Carolina to "the bad example of an unnatural and immoral but lawful cohabitation."[70] Unlike the Tennessee court in *Bell*, the North Carolina court refused to treat miscegeny as analogous to incest and polygamy.[71] It characterized polygamous marriages, and incestuous marriages in the direct line and between nearest collaterals, as the few cases that all states agree are invalid, but noted that beyond those cases, differences exist among the states as to which marriages are permitted.[72] Even though "revolting" to North Carolinians, valid marriages performed in another state between residents of that state would be recognized in North Carolina "under obligations of comity to our sister States."[73]

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61. *Id.*
62. *Id.*
63. *See, e.g.*, State v. Bell, 66 Tenn. 9 (1872); State v. Ross, 76 N.C. 242 (1877).
64. *Bell*, 66 Tenn. at 11.
65. *Id.* at 10.
66. *Id.* at 10-11.
67. *Id.* at 11.
68. State v. Ross, 76 N.C. 242, 247 (1877).
69. *Id.*
70. *Id.*
71. *Id.* at 246.
72. *Id.*
73. *Id.* at 246-47.

B. One or Both Parties Domiciliaries of the Local Forum

1. Incest.—In 1981, the Supreme Court of Kansas was faced with reconciling a Kansas statute that declared first cousin marriages "incestuous and absolutely void" with its validating statute in determining whether to recognize a Colorado marriage between a Kansas resident and an Oklahoma resident who returned to live in Kansas.[74] The court found the marriage valid, basing its decision on the following: (1) it could not find "that a first cousin marriage validly contracted elsewhere is odious to the public policy of this state," noting that sexual intercourse between first cousins was not within the statute prohibiting incest; (2) Kansas did not have an evasion statute; and (3) there was no precedent for voiding a marriage as an evasion of Kansas law.[75]

Michigan courts have limited the applicability of its prohibition against first cousin marriages to those solemnized in that state,[76] even recognizing such marriages when the Michigan residents went out of state to avoid its prohibitions.[77] The Supreme Court of Ohio recognized the validity of a marriage between one of its citizens and his first cousin in her place of domicile, Massachusetts.[78] In order to avoid a Massachusetts evasion law which would have invalidated the marriage, the Ohio court had to decide the question of whether a marriage between first cousins was void ab initio in Ohio.[79] Based on the absence of a statute expressly declaring such marriages void and the absence of criminal sanctions against sexual relations between first cousins, the court found that first cousin marriages were not void ab initio in Ohio. Because the Massachusetts marriage was valid, the court recognized the marriage in Ohio.[80]

Recognizing the validity of an Italian marriage between a New York resident and his Italian niece, a New York court stated that, although a marriage between an uncle and a niece is incestuous and void under New York law, the prohibition applied only to marriages performed in that state.[81] While stating the rule that "marriages, legal where performed, will be recognized in New York unless repugnant to the laws of nature," the court noted that uncle-niece marriages were legal in New York prior to 1893 and presently were "not universally condemned."[82] The implication is that uncle-niece marriages are not "repugnant to the laws of nature."[83]

Evasion statutes have been invoked to invalidate incestuous marriages where at least one party is a resident of the forum. The Supreme Court of Arizona, applying an evasion statute, did not recognize the marriage of two of its residents for the purposes of intestate succession.[84] The couple, who were first cousins, had been validly married in New Mexico

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74. Estate of Loughmiller, 629 P.2d 156, 158 (Kan. 1981).
75. *Id.* at 161.
76. *See* Toth v. Toth, 212 N.W.2d 812, 813 (Mich. Ct. App. 1973).
77. *See In re* Miller's Estate, 214 N.W. 428 (Mich. 1927).
78. Mazzolini v. Mazzolini, 155 N.E.2d 206 (Ohio 1958).
79. *Id.* at 208.
80. *Id.* at 208-09.
81. Campione v. Campione, 107 N.Y.S.2d 170, 171 (N.Y. Sup. Ct. 1951).
82. *Id.*
83. *Id.*
84. *In re* Mortenson's Estate, 316 P.2d 1106, 1108 (Ariz. 1957).

and then returned to Arizona to live. A Connecticut court similarly used an evasion statute to deny the validity of a marriage contracted in Italy between one of its citizens and his Italian niece.[85] The court based its finding that an uncle-niece marriage was against the strong public policy of the state on the state's long-standing statutory prohibition against such marriages and its imposition of criminal penalties "for such kindred to either marry or carnally know each other."[86] The dissent criticized the majority's denial of survivor's rights, finding the widow "innocent of any intent to violate [Connecticut] laws."[87] The dissent would have sustained annulling the marriage only if it was clear that the parties married outside the state to avoid its laws.[88]

Similarly, a New Jersey court denied full recognition of an Italian marriage between a New Jersey resident and his Italian niece.[89] Because the intention of the parties at the time of the marriage was to reside in New Jersey, the court found that the validity of the marriage should be determined by New Jersey, not Italian, law.[90] The court held that recognition of the marriage as valid would be contrary to the public policy of the state as evidenced by its statutes that declared uncle-niece marriages absolutely void and subject to criminal sanctions.[91]

2. Underage.—Modern courts are more willing to apply the doctrine of comity and recognize out-of-state marriages in nonage cases than in cases involving incest or miscegeny. Generally, such marriages are voidable by statute, not void ab initio.[92] Absent an action by one of the parties, courts have upheld the validity of marriages by underage residents, even when contracted out-of-state to evade local age requirements.[93] The Supreme Court of Arkansas agreed with a trial court's finding that the Mississippi marriage of two Arkansas residents, who were both underage by Arkansas law, was valid.[94] The court found "no strong public policy in this state requiring the courts to declare that marriages such as the one involved here are void ab initio." Similarly, a New Jersey court recognized the Maryland marriage of two New Jersey residents as valid until annulled, even though "the juveniles were married in Maryland to evade [the] New Jersey statute."[95]

The Tennessee Supreme Court applied Georgia law to validate the marriage of two of its residents, one of whom was underage by Tennessee standards.[96] In denying the petition for annulment by the wife's father, the court noted that the public policy of the state regarding

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85. Catalano v. Catalano, 170 A.2d 726, 728 (Conn. 1961).

86. *Id.*

87. *Id.* at 731.

88. *Id.* at 731-32.

89. Bucca v. State, 128 A.2d 506, 511 (N.J. Super. Ct. Ch. Div. 1957).

90. *Id.* at 510.

91. *Id.* at 510-11. *Compare*, Campione v. Campione, 107 N.Y.S. 2d 70 (N.Y. Sup. Ct. 1951), discussed *supra* at notes 81-83 and accompanying text.

92. Wilkins v. Zelichowski, 140 A.2d 65 (N.J. 1958); Mitchell v. Mitchell, 117 N.Y.S. 671 (N.Y. Sup. Ct. 1909).

93. State v. Graves, 307 S.W.2d 545 (Ark. 1957); *In re* State in Interest of I., 173 A.2d 457 (N.J. Juv. & Dom. Rel. Ct. 1961).

94. *Graves*, 307 S.W.2d at 547.

95. *In re I.*, 173 A.2d at 460.

96. Keith v. Pack, 187 S.W.2d 618 (Tenn. 1945).

underage marriages, as evidenced by its statutes, provided for discretionary annulment of such marriages, unlike miscegenic marriages, which were void by statue.[97] Kentucky's highest court held underage marriages to be voidable only if they were contracted in the state, reaching this result on the basis of its validating statute.[98] The court found that underage marriages were not against the public policy of Kentucky as such marriages could be ratified by later cohabitation and were declared by statute to be merely voidable, not void.[99]

An early nonage case applied local law to annul the out-of-state marriage of two of its citizens.[100] The Supreme Court of Oklahoma refused to consider the validity of a marriage between Oklahoma residents, one of whom was underage, under the law of Arkansas, where it had been contracted.[101] Invoking the state's sovereign right to determine the status of its citizens, the court applied Oklahoma law to affirm the lower court's annulment of the marriage.[102]

3. *Miscegeny.*—With one exception, courts have applied the public policy exception vigorously to invalidate miscegenic marriages where at least one of the parties was domiciled in the forum state. In *Medway v. Needham*,[103] the exceptional case, a couple residing in Massachusetts was married in Rhode Island where miscegenic marriages were not prohibited, then returned to Massachusetts to live. The Massachusetts Supreme Court refused to give extraterritorial effect to its laws, which prohibited miscegenic marriages and declared them void.[104] In finding that miscegenic marriages could be declared void only "if contracted within this state,"[105] the court reasoned that the avoidance of "extreme inconveniences and cruelty"[106] required recognition of marriages contracted outside the forum. The court distinguished the application of the public policy exception to cases, such as incest, "which would tend to outrage the principles and feelings of all civilized nations," from the toleration of marriages, such as miscegenic marriages, "which are prohibited merely on account of political expediency."[107] The precedential effect of *Medway*, however, carried little weight, especially after Massachusetts enacted an evasion statute that would have dictated a different result.[108]

The strongest assertion of the public policy exception to invalidate out-of-state

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97. *Id.* at 619.
98. Mangrum v. Mangrum, 220 S.W.2d 406, 408 (Ky. 1949).
99. *Id.*
100. Ross v. Bryant, 217 P. 364 (Okla. 1923).
101. *Id.* at 365.
102. *Id.* at 366.
103. 16 Mass. 157, 158 (1819).
104. *Id.* at 159.
105. *Id.*
106. *Id.* at 160.
107. *Id.* at 161.
108. State v. Kennedy, 76 N.C. 251, 253 (1877). In reviewing precedent on the recognition of marriages contracted out-of-state by in-state residents, the *Kennedy* court noted that after the decision in *Medway*, Massachusetts enacted legislation to "extend her law prescribing incapacities for contracting marriage over her own citizens who contract marriage in other countries by whose law no such incapacities exist"; *i.e.*, an evasion statute. Since the decision in *Medway* was based on the absence of any ability to give extraterritorial effect to its own laws, the presence of an evasion statute would have overcome this deficiency.

marriages occurred when courts applied the principle to miscegenic marriages. In refusing to allow the right of succession to the surviving spouse of a miscegenic marriage of Louisiana residents, the Supreme Court of Louisiana concluded:

> Whatever validity might be attached in France to the singular marriage contract, and subsequent unnatural alliance there celebrated between the plaintiff and the deceased testatrix, it is plain that, under the facts in evidence, the Courts of Louisiana cannot give effect to these acts, without sanctioning an evasion of the laws, and setting at naught the deliberate policy of the State.[109]

The same North Carolina court that gave full recognition to an out-of-state miscegenic marriage of non-residents[110] later affirmed the conviction of two of its residents on charges of fornication and adultery.[111] The couple's marriage, which was validly contracted in South Carolina and which would have been a defense to the charges, was not recognized by the court, based upon the North Carolina law, which declared miscegenic marriages void.[112] The court distinguished the rule that the place of contracting governs the formalities of the marriage from the rule that the place of domicile determines the capacity of its citizens to marry: "[W]hen the law of North Carolina declares that all marriages between negroes and white persons shall be void, this is a personal incapacity which follows the parties wherever they go so long as they remain domiciled in North Carolina."[113]

The Supreme Court of Virginia refused to recognize the miscegenic marriage of two of its residents, validly contracted in the District of Columbia, for the purposes of legitimizing the offspring of the parties and thereby allowing the children to recover a legacy.[114] Refusing to consider the applicability of statutes that legitimized the issue of parents who subsequently married and those of a marriage deemed null at law, the court based its decision upon the rule that the place of domicile determines the personal capacity of its residents to marry.[115] As pointed out by the dissent, the legitimizing statutes had been applied to hold legitimate the children of a bigamous marriage[116] (the only other grounds, besides miscegeny, which rendered a marriage absolutely void under Virginia law).[117] However, the decision implies that the majority considered miscegeny the more serious offense.

In 1890, a federal circuit court in Georgia found no constitutional impediment to the state of Georgia's indictment, on charges of fornication, of a Georgia couple who had left the state to contract a valid marriage in the District of Columbia, then returned to Georgia to reside.[118] The court reviewed the state's antimiscegenation and evasion statutes and found both to be proper exercises of the state's authority to regulate marriages.[119] As in the other

109. Dupre v. Boulard's Executor, 10 La. Ann. 411, 412 (1855).

110. State v. Ross, 76 N.C. 242 (1877). *See supra* notes 68-73 and accompanying text.

111. *Kennedy*, 76 N.C. at 253.

112. *Id.* at 252.

113. *Id.*

114. Greenhow v. James' Executor, 80 Va. 636, 638-39 (1885).

115. *Id.* at 641.

116. *Id.* at 649.

117. *Id.* at 646.

118. State v. Tutty, 41 F. 753 (C.C.S.D. Ga. 1890).

119. *Id.* at 762-63.

cases, the circuit court distinguished between the rule recognizing foreign marriages where the form and ceremony differed from local law and the rule that such marriages are void if against the public policy of the state of domicile.[120]

The Supreme Court of Oklahoma ruled that the surviving spouse of a miscegenic marriage had inherited no property rights from his deceased spouse because the marriage was void under Oklahoma law.[121] Since both parties were Oklahoma residents before and after their marriage was contracted in Arkansas, the court refused to recognize the validity of the marriage because it was made in evasion of Oklahoma's antimiscegenation statute.[122] The Supreme Court of Montana also refused to recognize a miscegenic marriage, finding that it had been made in order to evade local law.[123] Montana's statute, which declared miscegenic marriages "utterly null and void," extended its reach to apply to such marriages contracted elsewhere by Montana residents.[124] Because the deceased husband was a Japanese national and a resident of Montana at the time of the marriage, the court refused to recognize his spouse as the surviving widow.[125]

The cases discussed above indicate a strong willingness by the courts to invalidate the miscegenic marriages of state residents. Given that prior to 1967, there was a split of opinion among the states as to the propriety of such marriages,[126] the consistency of results in refusing to recognize miscegenic marriages is noteworthy. With one exception,[127] the courts ignored the policy choices of the states in which the marriages were validly contracted. In contrast, the split of opinion among the states as to the propriety of first-cousin marriages did not generate the same consistency of results.[128] Rather, courts were more willing to accept the policy choices of the contracting forum in recognizing out-of-state first-cousin marriages, even though such marriages were prohibited as incestuous by local law.

Proponents of recognition of out-of-state same-sex marriages should take note of the contrast in the results of applying the public policy exception to miscegenic and first-cousin marriages of local domiciliaries. Proponents could argue that the same deference given to the policy choices of sister states regarding first-cousin marriages should be given to policy choices of sister states regarding same-sex marriages. Opponents could be placed in the embarrassing position of appealing to the authority of courts that enforced the miscegeny prohibitions that were declared unconstitutional more than a quarter century ago.

III. Same Sex of Parties as a Public Policy Exception

Resistance to the recognition of valid same-sex marriages depends on successfully establishing that the public policy of the state contravenes such recognition. Evidence of a

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120. *Id.* at 761-62.

121. Eggers v. Olson, 231 P. 483, 486 (Okla. 1924).

122. *Id.* at 485.

123. *In re* Takahashi's Estate, 129 P.2d 217, 222 (Mont. 1942).

124. *Id.* at 219.

125. *Id.* at 222.

126. Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967).

127. *See* Medway v. Needham, 16 Mass. 157 (1819), discussed *supra* at notes 104-08 and accompanying text.

128. *See supra* subpart II.B.1.

state's public policy regarding same-sex marriages may be adduced from the presence or absence of state statutory prohibitions and from state decisional authority on the subject. Other factors that indicate the strength of a state's public policy against same-sex marriage are state constitutional provisions and court decisions on matters related to the incidents of marriage where the couple is of the same sex. In regard to the latter, such matters as child custody decisions and visitation rights, adoption, division of property, and rights of survivors may be instructive.

A. Statutory Prohibitions

Statutory prohibitions regarding same-sex marriages may be in the form of a statute limiting the term "marriage" to parties of the opposite sex. The limitation may be express[129] or implied.[130] The absence of same-sex marriages from the list of those prohibited by the state may bolster the argument that the policy of the state is insufficient to require invalidation of such marriages.[131] To counter the attachment of significance to the absence of same-sex marriages from the list of statutory prohibitions, an argument could be made that since marriage, by definition, contemplates that the parties are of the opposite sex, an explicit prohibition would be superfluous. Overcoming this objection would require the court to eschew acceptance of the circular argument that marriage is limited to a union between a man and a woman because marriage is a union between a man and a woman.[132]

The existence of sodomy statutes may be used as evidence of a state's public policy against same-sex marriage. The implication is that a same-sex marriage necessarily includes homosexual activity of the type prohibited by statute. Twenty-one states currently have active sodomy statutes, four of which limit the prohibition to persons of the same sex.[133] The difficulty in using the existence of a sodomy statute as evidence of a state's public policy against same-sex marriage is threefold.

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129. *E.g.*, the Uniform Act clearly defines the limitation: "Marriage is a personal relationship between a man and a woman . . . ." UNIF. MARRIAGE AND DIVORCE ACT § 201 (1973). Ohio's statute states the limitation more ambiguously: "Male persons . . . and female persons . . . may be joined in marriage." OHIO REV. CODE ANN. § 3101.01 (Anderson 1989 & Supp. 1993). The ambiguity arises because, by using the plural, one might read the statute to mean "male persons may be joined and female persons may be joined." However, an Ohio court construed the statute to permit marriage "only between members of the opposite sex." Gajovski v. Gajovski, 610 N.E.2d 431, 433 (Ohio Ct. App. 1991).

130. *E.g.*, the Hawaii statute implies the limitation, stating: "The *man* does not at the time have any lawful *wife* living and that the *woman* does not at the time have any lawful *husband* living." HAW. REV. STAT. § 572-1(3) (1993) (emphasis added).

131. Although the Uniform Act clearly limits the term "marriage" to "a man and a woman" (*supra* note 130), it does not include as a prohibited marriage one in which the parties are of the same sex. UNIF. MARRIAGE AND DIVORCE ACT § 207 (1973).

132. *See* Baehr v. Lewin, 852 P.2d 44, 61, discussed *supra* at notes 2-7 and accompanying text, which characterized similar reasoning as "circular and unpersuasive."

133. The states in which sodomy is prohibited, regardless of the sex of the participants are Alabama, Arizona, Florida, Georgia, Idaho, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, North Carolina, Oklahoma, Rhode Island, South Carolina, Utah, and Virginia; the states which prohibit sodomy only between persons of the same sex are Arkansas, Kansas, Missouri, and Tennessee. *Sodomy Statutes*, THE LAMBDA UPDATE (Lambda Legal Def. and Educ. Fund, New York, N.Y.), Spring 1993, at 17.

First, such use assumes that the parties to a same-sex marriage are homosexual. As the Supreme Court of Hawaii indicated in *Baehr*, the sexual orientation of the parties is irrelevant to the issue of same-sex marriage.[134] Because the parties to a same-sex marriage may be heterosexual, the existence of a sodomy statute does not provide cogent evidence of a state's public policy concerning same-sex marriage.

Secondly, sodomy statutes merely proscribe certain types of sexual behavior between *unmarried* participants.[135] Thus, in a state prohibiting sodomy regardless of the sex of the participants, the sodomy statute is no more indicative of public policy against same-sex marriage than it is of public policy against opposite-sex marriage. The intent of the statute is to proscribe certain sexual activity between unmarried individuals, not to proscribe sexual activity between persons married to each other.

Thirdly, use of a sodomy statute as evidence of a state's public policy against same-sex marriage assumes that the parties will necessarily engage in sexual activity. Because it is neither assumed nor required that sexual activity will occur between parties to an opposite-sex marriage,[136] it is illogical to make a similar assumption or impose a similar requirement on the parties to a same-sex marriage. Consequently, a statute prohibiting certain acts would shed little light on the subject of a state's public policy regarding the status between parties who may or may not commit those acts. In sum, the existence of a sodomy statute has no relevance in determining a state's public policy regarding same-sex marriage.

B. Case History of Same-Sex Marriage

Until the *Baehr* decision, the outcome of cases addressing questions regarding same-sex marriage was consistently unfavorable to the parties seeking to assert the right to marry. Cases challenging the state's refusal to issue marriage licenses to same-sex couples (*Baker v. Nelson*,[137] *Jones v. Hallahan*,[138] and *Singer v. Hara*[139]) were uniformly decided in favor of the state's right to deny those couples the right to occupy the marital status.[140] The relevance of these decisions to the issue of applying the public policy exception to invalidate a same-sex marriage is questionable. In all three cases, the question presented was not whether the public policy of the state prohibited recognition of a same-sex marriage validly contracted out-of-state, but whether state law authorized issuance of marriage licenses to same-sex couples. A similar distinction can be made between a court deciding that first-

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134. *Baehr*, 852 P.2d at 51 n.11, discussed *supra* at notes 2-7 and accompanying text.

135. *E.g.*, UTAH CODE ANN. § 76-5-406 (1990 & Supp. 1993). This section reads, in part: "An act of . . . sodomy . . . is without consent of the victim [if] . . . (7) the actor knows that the victim submits or participates because the victim erroneously believes that the actor is the victim's spouse . . . ." In other words, the crime of sodomy is not committed if the participants are each other's spouse.

136. The only area in the marriage statutes where sexual activity is mentioned is when an annulment of the marriage is sought because one party "lacks the physical capacity to consummate the marriage by sexual intercourse, and at the time the marriage was solemnized the other party did not know of the incapacity." UNIF. MARRIAGE AND DIVORCE ACT § 208(a)(2) (1973).

137. 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

138. 501 S.W.2d 588 (Ky. 1973).

139. 522 P.2d 1187 (Wash. Ct. App. 1974).

140. For an in-depth analysis of *Baker*, *Jones*, and *Singer*, see Otis R. Damslet, Note, *Same-Sex Marriage*, 10 N.Y. L. SCH. J. HUM. RTS. 555, Parts III-A, III-B, and III-C (1993).

cousin marriages are not authorized by state law, yet deciding to recognize a first-cousin marriage validly contracted elsewhere. The narrower and more pertinent question is whether a state, which has found that its own statutes prohibit same-sex marriage, will give extraterritorial effect to that local prohibition. The precedential value of these decisions is that the question of whether same-sex marriages are prohibited locally has been answered. The courts in those states, like the courts in others, will still be required to answer choice-of-law questions, determine the strength of the public policy supporting the prohibition, and decide whether state policy choices should be enforced by invalidating the marriages.

Two cases have addressed the question of the validity of a same-sex marriage. In *Anonymous v. Anonymous*, a New York court declared that the marriage ceremony in Texas between a New York male resident and a male who appeared to be female (and who was presumably a resident of Texas) was a nullity.[141] The court did not consider Texas law, but based its decision on the assertions that "[t]he law makes no provision for a 'marriage' between persons of the same sex" and that "[m]arriage is and always has been a contract between a man and a woman."[142] Apparently, the court assumed these assertions were universal truths, thereby obviating the need to consult Texas law. Since that assumption could not be made when faced with a same-sex marriage contracted in a state which recognized such marriages, that case is inapposite for the question at hand.

In *Adams v. Howerton*, the Ninth Circuit held that the marriage of two males in Colorado did not qualify one of the parties to be the "spouse" of the other for immigration purposes.[143] Finding it unnecessary to determine the validity of the Colorado marriage, the court determined that "Congress intended that only partners in heterosexual marriages be considered spouses"[144] under an immigration law provision granting preferential admission treatment to spouses. This conclusion was based upon two factors: (1) Congress did not indicate an intent to enlarge the meaning of the term "marriage" to include same-sex marriages, and (2) provisions excluding homosexuals were part of the same immigration act, implying an inconsistency if homosexuals were then accorded preferential treatment as spouses. In regard to the first factor, the court's reasoning is flawed in that it merely reiterates the circular argument that the term "marriage" does not include relationships between two persons of the same sex because two persons of the same sex cannot marry. As to the second factor, the court erroneously assumes that homosexuality is a prerequisite of same-sex marriage. As noted in *Baehr*, the sexual orientation of the parties is irrelevant to a same-sex marriage.[145]

A New York court refused to allow the surviving partner of a homosexual relationship to claim spousal rights against his partner's will.[146] Asserting that the only reason he and the decedent were not married was "because marriage license clerks in New York state will not issue licenses to persons of the same sex,"[147] the surviving partner argued that the denial

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141. 325 N.Y.S.2d 499, 501 (N.Y. Sup. Ct. 1971).

142. *Id.* at 500.

143. 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

144. *Id.* at 1041.

145. *Baehr*, 852 P.2d at 51 n.11, discussed *supra* at notes 2-7 and accompanying text.

146. *In re* Estate of Cooper, 564 N.Y.S.2d 684 (N.Y. Sur. Ct. 1990), *aff'd*, 592 N.Y.S.2d 797 (N.Y. App. Div. 1993), *appeal dismissed*, 82 N.Y.2d 801 (N.Y. 1993).

147. *Id.* at 685, quoting appellant's petition.

deprived him of his constitutional guarantee of equal protection of the law.[148] The court held that "persons of the same sex have no constitutional rights to enter into a marriage with each other."[149] Because the surviving partner did not contend that he and the decedent were married to each other, the precedential value of this decision suffers from the same limitations as those of *Baker*, *Jones*, and *Singer*.[150] The decision that a same-sex marriage cannot be entered into in New York is not dispositive of the issue of the validity of such marriages entered into elsewhere.

C. State Constitutional Provisions

The heart of the *Baehr* decision is that the state statute restricting marriage to opposite-sex couples may violate the equal protection provision of the state constitution.[151] The Hawaii Constitution specifically bans discrimination on the basis of sex, as do the constitutions of several other states.[152] In states that have constitutional provisions similar to Hawaii's, such provisions may provide a definitive answer to the question of discerning the public policy of the state with respect to same-sex marriage. A constitutional provision that prohibits an abridgment of rights on the basis of sex is a public policy statement of sufficient strength to abrogate any legislative enactments expressing a contrary policy. Consequently, in a state having such a provision, invalidation of a same-sex marriage by application of the public policy exception may be avoided by urging that the state constitution would be violated by allowing a man to marry a woman yet prohibiting a woman from marrying a woman.

Singer, however, is contrary authority.[153] The Washington Supreme Court held that the

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148. *See* U.S. CONST. amend. XIV, §1.

149. *In re Estate of Cooper*, 564 N.Y.S.2d at 685.

150. *See* discussion *supra* at notes 138-40 and accompanying text.

151. *See* Baehr v. Lewin, 852 P.2d 44, discussed *supra* at text accompanying notes 2-7.

152. *See* COLO. CONST. art. II, § 29 ("Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."); CONN. CONST. art. I, § 20 ("No person shall be denied the equal protection of the law nor be subjected to . . . discrimination in the exercise or enjoyment of his or her civil or political rights because of . . . sex . . . ."); ILL. CONST. art. I, § 18 ("The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."); LA. CONST. art. I, § 3 ("No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations."); MASS. CONST. art. I ("Equality under the law shall not be denied or abridged because of sex . . . ."); MD. CONST. D. of R. art. 46 ("Equality of rights under the law shall not be abridged or denied because of sex."); PA. CONST. art. I, § 28 ("Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."); R.I. CONST. art. I, § 2 ("No person shall be . . . denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state."); TEX. CONST. art. I, § 3a ("Equality under the law shall not be denied or abridged because of sex . . . ."); UTAH CONST. art. IV, § 1 ("Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges."); WYO. CONST. art. VI, § 1 ("Both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges.").

153. Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974), discussed *supra* at text accompanying note 140.

state's equal rights amendment "does not require the state to authorize same-sex marriage."[154] Although this holding does not support the proposition that invalidating out-of-state same-sex marriages would violate the state's constitutional guarantee of equal rights regardless of sex, neither does it support the proposition that invalidation is mandated by state policy.

Other state constitutional provisions may also be helpful in avoiding invalidation on public policy grounds.[155] A provision that prohibits the granting of privileges or immunities to one citizen or class of citizens that is not granted to all citizens supports the argument that states violate their constitutional mandates in recognizing the marriages of opposite-sex couples while denying the same privilege to same-sex couples.

It might prove quite difficult, however, to appeal to state constitutional provisions to avoid invalidation if they are similar to provisions in the United States Constitution. *Baker*[156] is authority for the proposition that state denial of marriage licenses to same-sex couples is not violative of the First, Eighth, Ninth, or Fourteenth Amendments of the United States Constitution.[157] The United States Supreme Court dismissed the appeal from the Minnesota court's decision in *Baker* for want of a substantial federal question.[158] Because such a dismissal operates as a holding that the constitutional challenge was rejected,[159] *Baker* remains good authority that there is no constitutional impediment on the federal level to prohibit same-sex marriages.

CONCLUSION

If the subsequent decision in *Baehr* ends Hawaii's restriction of marriage to opposite-sex couples, same-sex couples will marry in Hawaii and will seek recognition of their marriages in other states. Because it is generally believed that a same-sex marriage implies that the parties are homosexual, and because "[p]olls about gays suggest that Americans are most tolerant of sexual differences when they don't have to confront them,"[160] it is almost

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154. *Id.* at 1195.

155. *See* ARIZ. CONST. art. II, § 13 ("No law shall be enacted granting to any citizen, class of citizens or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."); CAL. CONST. art. I, § 7(b) ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."); IND. CONST. art. I, § 23 ("The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."); IOWA CONST. art. I, § 6 ("[T]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.").

156. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed* 409 U.S. 810 (1972). *See* discussion accompanying *supra* note 138.

157. *Id.* at 187. Baker argued that the Ninth Amendment guaranteed a fundamental right to marry that, by application of the Fourteenth Amendment, could not be restricted. Further, Baker contended that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were offended by the state's restriction of marriage to only opposite-sex couples. Baker's First and Eighth Amendment challenges were dismissed by the court without discussion.

158. *Id.*

159. Hicks v. Miranda, 422 U.S. 332, 344 (1975).

160. *The Power and the Pride*, NEWSWEEK, June 21, 1993, at 60.

certain that the visibility attendant to seeking recognition will encounter resistance. Whether same-sex couples can overcome such resistance will depend on whether choice-of-law issues and issues regarding the public policy exception to recognition of valid marriages are resolved in their favor.

Assuming a decision favorable to the plaintiffs in *Baehr*, same-sex couples who reside in Hawaii when they marry will probably be afforded recognition of their marriages in other states. Other couples, who are domiciled outside of Hawaii when they marry there, will probably generate a patchwork of decisions when they seek recognition—some of those marriages will be recognized, but others will be invalidated. The uncertainty of results would fuel an inexorable march to the door of the United States Supreme Court, much as the miscegeny decisions did a generation ago.[161]

In Justice Warren's words, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[162] For those free men (and women) long denied this right, the Hawaii Supreme Court has courageously cracked open the access door. Only after the legal battles have been fought will we know whether other state courts can match its courage.

161. Loving v. Virginia, 388 U.S. 1 (1967), discussed *supra* at note 34 and accompanying text.

162. *Id.* at 12.